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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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UNITED SERVICES AUTOMOBILE) (
ASSOCIATION

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) (CIVIL ACTION NO.

5

VS.

) (2:18-CV-366-JRG

6

) (MARSHALL, TEXAS
JANUARY 6, 2020

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WELLS FARGO BANK, N.A.) (1:45 P.M.

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TRANSCRIPT OF JURY TRIAL

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AFTERNOON SESSION

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BEFORE THE HONORABLE CHIEF JUDGE RODNEY GILSTRAP,

12

UNITED STATES DISTRICT JUDGE

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APPEARANCES:

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FOR THE PLAINTIFF:

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19 Official Court Reporter
20 United States District Court
21 Eastern District of Texas
22 Marshall Division
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24 Marshall, Texas 75670
25 (903) 923-7464

23 (Proceedings recorded by mechanical stenography, transcript
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25

P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

Counsel, where are we on -- with regard to the stipulation that was being worked out over the lunch break?

MS. GLASSER: We're happy to announce, we've reached an agreement.

THE COURT: All right. Why don't you go to the podium and read the stipulation into the record.

MS. GLASSER: Our understanding is that we would read it before the jury.

MR. BITTNER: Our understanding is we're going to read it in the record and you put it in the charge.

THE COURT: My understanding was we'll read it into the record and that would inform both demonstrative slides that we talked about in chambers and other matters going forward.

All right.

MS. GLASSER: Well, we --

THE COURT: Read it into the record, please, counsel, slowly.

MS. GLASSER: It is an established fact that the system accused of infringement satisfies the following limitations of the claims:

01:46:15 1 '605 patent, Claim 1, an image capture and
01:46:21 2 processing system for use with a digital camera, the image
01:46:25 3 capture and processing system comprising a portable device
01:46:28 4 comprising a general purpose computer including a processor
01:46:32 5 coupled to a memory, the memory storing.

01:46:36 6 '605 patent, Claim 12, a system for allowing a
01:46:40 7 customer to deposit a check using a customer's own handheld
01:46:45 8 mobile device with a digital camera, the system configured
01:46:48 9 to authenticate the customer, the system including. All
01:46:54 10 other instances in Claim 1 and Claim 12 of the '605 patent
01:46:58 11 of the term "mobile device" or "portable device."

01:47:02 12 '681 patent, Claim 12, a system for allowing a
01:47:06 13 customer to deposit a check using the customer's own mobile
01:47:10 14 device with a digital camera, the system configured to ask
01:47:14 15 the customer to log in using a user name and password, the
01:47:18 16 system including.

01:47:21 17 '681 patent, Claim 30, a non-transitory
01:47:25 18 computer-readable medium storing an app that when
01:47:28 19 downloaded and run by a customer's mobile device causes the
01:47:32 20 customer's mobile device to perform. All other instances
01:47:38 21 in Claims 12, 20, and 30 of the '681 patent of the term
01:47:43 22 "mobile device."

01:47:47 23 THE COURT: Does that complete the stipulation as
01:47:49 24 understood by the Plaintiff?

01:47:50 25 MS. GLASSER: It does, Your Honor.

01:47:51 1 THE COURT: Can Defendant confirm on the record
01:47:52 2 that that is their stipulation, as well?

01:47:55 3 MR. BITTNER: Yes, Your Honor.

01:47:56 4 THE COURT: All right. Such stipulation is
01:47:59 5 accepted by the Court.

01:48:00 6 All right. At this point I'm prepared to bring in
01:48:27 7 the jury and give them my preliminary instructions, to
01:48:30 8 proceed with opening statements thereafter.

01:48:34 9 Mr. Sheasby, I understand you're going to present
01:48:40 10 the opening statement for Plaintiff.

01:48:41 11 MR. SHEASBY: Yes, Your Honor.

01:48:42 12 THE COURT: And what warning would you like on
01:48:44 13 your time?

01:48:44 14 MR. SHEASBY: 15 and 5, Your Honor.

01:48:46 15 THE COURT: When you've used 15 minutes and when
01:48:47 16 you have 5 minutes remaining?

01:48:51 17 MR. SHEASBY: Yes, Your Honor.

01:48:51 18 THE COURT: And, Ms. Williams, I understand you'll
01:48:54 19 present Defendant's opening?

01:48:55 20 MS. WILLIAMS: Yes, Your Honor.

01:48:56 21 THE COURT: What is your request for a warning?

01:48:59 22 MS. WILLIAMS: Five-minute warning when I have
01:49:03 23 five minutes left, Your Honor.

01:49:04 24 THE COURT: All right.

01:49:04 25

01:49:04 1 MS. WILLIAMS: Thank you.

01:49:04 2 MR. MELSHEIMER: Your Honor, for purposes of the
01:49:07 3 opening statement, would I be permitted to move my seat
01:49:10 4 over here?

01:49:11 5 THE COURT: Over where?

01:49:12 6 MR. MELSHEIMER: Right next to Mr. Johnson, Your
01:49:15 7 Honor.

01:49:15 8 THE COURT: There is no need to ask permission to
01:49:18 9 move chair to chair at the counsel table.

01:49:18 10 MR. MELSHEIMER: We had filled out a form -- a
01:49:21 11 chart. I just wanted to make sure.

01:49:22 12 THE COURT: That's fine.

01:49:23 13 MR. MELSHEIMER: Thank you, Your Honor.

01:49:24 14 THE COURT: That's fine, Mr. Melsheimer.

01:49:25 15 I would say that unless you've appeared in the
01:49:27 16 case as counsel, you need to be on the other side of the
01:49:29 17 bar.

01:49:30 18 MR. MELSHEIMER: Yes, Your Honor.

01:49:31 19 THE COURT: I'm not talking about you.

01:49:33 20 MR. MELSHEIMER: Okay. Your Honor, if it's that
01:49:37 21 easy to get out of this, I'm gone.

01:49:39 22 THE COURT: There are a lot of other lawyers in
01:49:41 23 the room. I'm just saying unless you've appeared in the
01:49:44 24 case, you need to be on the other side of the bar.

01:49:46 25 MR. MELSHEIMER: Yes, Your Honor.

01:49:46 1 THE COURT: At some risk, I'll ask if there's
01:49:49 2 anything else I need to hear before I bring in the jury.

01:49:51 3 MR. SHEASBY: Nothing from Plaintiffs, Your Honor.

01:49:55 4 THE COURT: All right.

01:49:55 5 MS. WILLIAMS: Nothing from Defendants, Your
01:49:57 6 Honor.

01:49:57 7 THE COURT: Let's bring in the jury, please,
01:50:02 8 Mr. Johnston.

01:50:46 9 COURT SECURITY OFFICER: All rise.

01:50:47 10 (Jury in.)

01:50:47 11 THE COURT: Welcome back from lunch, ladies and
01:50:50 12 gentlemen.

01:50:50 13 I have some preliminary instructions that I need
01:50:51 14 to give you at this time before we start with opening
01:50:52 15 statements from the parties through their counsel and then
01:50:55 16 get on to the evidence.

01:50:58 17 You've been sworn as the jurors in this case, and
01:51:01 18 as the jury, you are the sole judges of the facts, and as
01:51:05 19 such, you will determine what the facts are in this case.
01:51:09 20 And as the Judge, I will give you instructions on the law,
01:51:12 21 decide questions of law that arise during the trial, handle
01:51:17 22 matters pertaining to evidence and procedure, and I'm also
01:51:20 23 responsible for maintaining the flow of the trial, and
01:51:23 24 maintaining the decorum of the courtroom.

01:51:25 25 At the end of the evidence, I'll give you detailed

01:51:29 1 instructions about the law that you are to apply in
01:51:31 2 deciding this case, and I'll give you a list of questions
01:51:36 3 that you are then to answer. This list of questions is
01:51:40 4 called the verdict form.

01:51:41 5 Your answers to those questions must be unanimous,
01:51:47 6 and your unanimous answers to those questions will
01:51:50 7 constitute the jury's verdict in this case.

01:51:56 8 I now want to briefly tell you what this case is
01:51:59 9 about. This case involves a dispute regarding certain
01:52:02 10 United States patents. Now, I know that you've all seen
01:52:05 11 the patent video this morning produced by the Federal
01:52:08 12 Judicial Center, but I want to give you some instructions
01:52:11 13 here and on the record about a patent and how one is
01:52:13 14 obtained.

01:52:13 15 Patents are granted or denied by the United States
01:52:16 16 Patent and Trademark Office, often, for short, simply
01:52:21 17 called the PTO.

01:52:22 18 A valid United States patent gives the
01:52:27 19 patentholder the right for up to 20 years from the date the
01:52:34 20 application is filed to prevent others from making, using,
01:52:34 21 offering to sell, or selling the patented invention in the
01:52:38 22 United States or from importing it into the United States
01:52:42 23 without the patentholder's permission.

01:52:44 24 A patent is a form of property called intellectual
01:52:49 25 property. And like other forms of property, a patent can

01:52:51 1 be bought or sold.

01:52:53 2 A violation of the patentholder's rights is called
01:52:58 3 infringement. A patentholder may try to enforce a patent
01:53:01 4 against persons it believes to be infringers by filing a
01:53:05 5 lawsuit in federal court, and that's what we have in this
01:53:08 6 case.

01:53:08 7 The process of obtaining a patent from the PTO is
01:53:12 8 called patent prosecution. To obtain a patent, you must
01:53:16 9 first file an application with the PTO. The PTO, as I've
01:53:21 10 said, is an agency of the United States Government, and it
01:53:25 11 employs trained examiners who review applications for
01:53:28 12 patents.

01:53:29 13 The application includes within it what's called a
01:53:34 14 specification. The specification contains a written
01:53:38 15 description of the claimed invention telling what it is,
01:53:42 16 how it works, how to make it, and how to use it.

01:53:45 17 The specification ends, or concludes, with one or
01:53:50 18 more numbered sentences. These numbered sentences that
01:53:53 19 follow the specification are called the patent claims.
01:53:58 20 When a patent is granted by the PTO, it's the claims that
01:54:02 21 define the boundaries of its protection and give notice to
01:54:06 22 the public of those boundaries.

01:54:08 23 Patent claims may exist in two forms referred to
01:54:13 24 as independent claims and dependent claims.

01:54:17 25 An independent claim does not refer to any other

01:54:20 1 claim in the patent. It's independent. It stands alone.
01:54:24 2 It's not necessary to look at any other claim to determine
01:54:27 3 what an independent claim covers.

01:54:29 4 On the other hand, a dependent claim refers to at
01:54:34 5 least one other claim in the patent. A dependent claim
01:54:42 6 includes each of the limitations or elements of that other
01:54:44 7 claim or claims to which it refers, or as we sometimes say,
01:54:49 8 from which it depends, as well as the additional
01:54:51 9 limitations or elements recited within the dependent claim
01:54:56 10 itself.

01:54:56 11 Therefore, to determine what a dependent claim
01:55:00 12 covers, it's necessary to look at both the dependent claim
01:55:07 13 itself and any other independent claim or claims from which
01:55:11 14 it refers or from which it depends.

01:55:12 15 The claims of the patents-in-suit use the word
01:55:15 16 comprising. Comprising means including or containing. A
01:55:19 17 claim that includes the word comprising is not limited to
01:55:24 18 the methods or devices having only the elements that are
01:55:28 19 recited in the claim but also covers methods or devices
01:55:32 20 that add additional elements.

01:55:35 21 Take, for example, a claim that covers a table.
01:55:39 22 If a claim recites a table comprising a tabletop, legs and
01:55:45 23 nails, the claim will cover any table that contains these
01:55:50 24 structures, even if the claim -- excuse me, even if the
01:55:53 25 table also contains other structures such as leaves to go

01:55:58 1 in the tabletop or wheels to go on the ends of the legs.

01:56:01 2 Now, that's a very simple example using the word
01:56:04 3 comprising and what it means. In other words, it can have
01:56:08 4 features in addition to those that are covered by the
01:56:10 5 patent.

01:56:10 6 Now, after an applicant files their application
01:56:14 7 with the PTO, an examiner is assigned, and that examiner
01:56:18 8 reviews the application to -- to determine whether or not
01:56:21 9 the claims are patentable, that is to say, appropriate for
01:56:26 10 patent protection, and whether or not the specification
01:56:30 11 adequately describes the invention claimed.

01:56:34 12 In examining the patent application, the examiner
01:56:37 13 reviews certain information about the state of the
01:56:42 14 technology that existed at the time the application was
01:56:45 15 filed. The PTO searches for and reviews this type of
01:56:49 16 information that's publicly available or that is submitted
01:56:54 17 by the applicant. This type of information is called prior
01:56:57 18 art.

01:56:57 19 The examiner reviews this prior art to determine
01:57:03 20 whether or not the invention is truly an advance over the
01:57:06 21 state of the art at the time.

01:57:10 22 Prior art is defined by law, and at a later time,
01:57:12 23 I'll give you specific instructions about what constitutes
01:57:16 24 prior art. However, in general, ladies and gentlemen,
01:57:20 25 prior art includes information that demonstrates the state

01:57:22 1 of the technology that existed before the claimed invention
01:57:26 2 was made or before the application for a patent was filed.

01:57:30 3 A patent contains a list of certain prior art that
01:57:35 4 the examiner has considered. The items on this list are
01:57:38 5 called the cited references.

01:57:41 6 Now, after the prior art search and examination of
01:57:46 7 the application, the examiner informs the applicant in
01:57:49 8 writing of what the examiner has found and whether the
01:57:53 9 examiner considers any claim to be patentable and thus
01:57:57 10 would be allowed.

01:57:58 11 Now, this writing from the examiner to the
01:58:00 12 applicant is called an Office Action. If the examiner
01:58:04 13 rejects the claims, the applicant has an opportunity to
01:58:07 14 respond to the examiner to try and persuade the examiner to
01:58:10 15 allow the claims. The applicant also has a chance to
01:58:14 16 change or amend the claims or to submit new claims.

01:58:18 17 Now, these papers generated during these
01:58:21 18 communications back and forth between the examiner and the
01:58:24 19 applicant is called the prosecution history.

01:58:28 20 Also, throughout this trial, you're going to hear
01:58:30 21 me say ladies and gentlemen because that's the way I'm
01:58:34 22 trained to say it. I know we have one gentleman on the
01:58:37 23 jury and seven ladies, but if I use the plural, gentlemen,
01:58:42 24 instead of gentleman, please forgive me. It will just be
01:58:45 25 simpler if I do it that way.

01:58:47 1 Now, this process can go back and forth between
01:58:49 2 the applicant and the examiner for some time until the
01:58:52 3 examiner is satisfied that the application meets the
01:58:55 4 requirements for a patent, and in that case, the
01:58:58 5 application issues as a United States patent, or in the
01:59:03 6 alternative, if the examiner ultimately concludes that the
01:59:05 7 application should be rejected in which case no patent is
01:59:09 8 issued.

01:59:10 9 Sometimes patents are issued after appeals within
01:59:10 10 the PTO to a Court.

01:59:17 11 Now, the fact that the PTO grants a patent does
01:59:19 12 not necessarily mean that any invention claimed in the
01:59:22 13 patent, in fact, deserves the protection of a patent.

01:59:25 14 While an issued United States patent is presumed
01:59:28 15 to be valid under the law, a person accused of infringement
01:59:33 16 has the right to argue here in federal court that a claimed
01:59:36 17 invention in a patent is invalid.

01:59:39 18 It's your job, ladies and gentlemen, as the jury,
01:59:42 19 to consider the evidence presented by the parties and to
01:59:45 20 determine independently and for yourselves whether or not
01:59:48 21 the Defendant has proven that the patents of the Plaintiff
01:59:52 22 are invalid.

01:59:53 23 Now, to help you follow the evidence, I'll give
01:59:56 24 you a brief summary of the positions of the parties.

01:59:59 25 As you all know, the person that brings a lawsuit

02:00:05 1 is called the Plaintiff. The Plaintiff and the patent
02:00:07 2 owner in this case is United Services Automobile
02:00:11 3 Association, which you will hear routinely referred to
02:00:14 4 throughout the trial as USAA, or simply as the Plaintiff.

02:00:20 5 And as you all know, the person against whom a
02:00:23 6 lawsuit is brought is called the Defendant. And in this
02:00:26 7 case, the Defendant is Wells Fargo Bank, NA, which you will
02:00:31 8 hear the parties refer to and the Court refer to simply as
02:00:35 9 Wells Fargo -- Wells Fargo or the Defendant.

02:00:40 10 Now, as I told you during jury selection, this is
02:00:43 11 a case of alleged patent infringement. And as I may have
02:00:45 12 already mentioned, there are two patents at issue in this
02:00:47 13 case.

02:00:51 14 The first is United States Patent No. 10,013,605.

02:00:56 15 Now, patents are commonly referred to by their
02:00:59 16 last three digits, so I'll refer to this patent as the '605
02:01:03 17 patent.

02:01:03 18 And the second patent at issue in this case is
02:01:06 19 United States Patent No. 10,013,681, which you'll hear
02:01:14 20 referred to throughout the trial again by its last three
02:01:16 21 digits as the '681 or the '681 patent.

02:01:18 22 These patents may refer to at various times
02:01:23 23 together as the patents-in-suit or as the asserted patents.
02:01:28 24 Those phrases mean these two patents, the '605 and the
02:01:33 25 '681.

02:01:33 1 These patents generally relate to systems and
02:01:37 2 methods for mobile check depositing. And you're going to
02:01:40 3 have a complete copy of each of these asserted patents, the
02:01:46 4 '605 and the '681, in your juror notebooks, and those
02:01:51 5 notebooks will be passed out to you in a few minutes.

02:01:54 6 Now, in the United States, a patentee is allowed
02:01:57 7 to file a later patent application with the PTO based on
02:02:01 8 the same specification as an earlier application but with
02:02:04 9 different claims. When that happens, the original patent
02:02:09 10 application is sometimes called the parent application, and
02:02:13 11 the later applications are sometimes called the children
02:02:18 12 applications.

02:02:18 13 These applications and the patents that issue from
02:02:21 14 them are said to be in the same patent family.

02:02:25 15 Now, the '605 patent and the '681 patent are not
02:02:30 16 part of the same patent family. They have similar patent
02:02:34 17 numbers because they were issued by the PTO around the same
02:02:38 18 time and not necessarily because they're related.

02:02:40 19 However, you're likely -- you'll likely hear
02:02:45 20 references throughout the trial to other members of the
02:02:48 21 '605 and the '681 patent families.

02:02:51 22 While patent -- while family members of the '605
02:02:54 23 and family members of the '681 patents may be relevant to
02:03:03 24 certain issues in this case, as I'll explain in more
02:03:05 25 details later, the ultimate issues of infringement,

02:03:08 1 invalidity, and damages must be determined for each
02:03:11 2 patent-in-suit individually and independent of its patent
02:03:16 3 family members.

02:03:16 4 The Plaintiff in this case, USAA, alleges that the
02:03:21 5 Defendant, Wells Fargo, is infringing claims -- pardon me
02:03:41 6 just a minute, ladies and gentlemen. I want to give you
02:03:55 7 the specific claim numbers that are alleged to infringe.
02:04:00 8 There have been some recent changes in those asserted
02:04:03 9 claims, and I want to make sure I give you the right
02:04:05 10 numbers. Let me verify that, please.

02:04:27 11 For the '605 patent, the actual asserted claims
02:04:31 12 that will be before you in this case are Claims 1, 3, 11
02:04:35 13 through 14, and 22.

02:04:37 14 For the '681 patent, the asserted claims that will
02:04:42 15 be before you in this case are Claims 12 through 14, 20,
02:04:47 16 22, and 30.

02:04:48 17 Thank you.

02:04:52 18 Now, you're going to hear these particular claims
02:04:56 19 referred to throughout the trial as the asserted claims.
02:05:00 20 You'll sometimes hear them as the claims in suit.

02:05:03 21 Now, USA -- USAA contends that Wells Fargo is
02:05:09 22 infringing these asserted claims by manufacturing, selling,
02:05:13 23 offering to sell, or importing into the United States Wells
02:05:21 24 Fargo's Mobile Deposit system, which you'll hear referred
02:05:26 25 to as the accused product. USAA contends that this

02:05:31 1 infringement was willful, and USAA contends that it's
02:05:33 2 entitled to money damages as a result of this infringement.

02:05:36 3 Now, the Defendant, Wells Fargo, denies that it is
02:05:40 4 infringing any of the asserted claims and contends that the
02:05:44 5 asserted claims are invalid as being anticipated or obvious
02:05:49 6 in light of the prior art.

02:05:50 7 Wells Fargo also contends that the asserted claims
02:05:58 8 are invalid because the patent's specification does not
02:06:02 9 contain a sufficient written description of the invention.

02:06:04 10 And, finally, Wells Fargo contends that even if it
02:06:09 11 does infringe the asserted claims and those claims are
02:06:12 12 valid, any damages awarded to USAA should be limited.

02:06:21 13 Now, I know that there are many new words and
02:06:24 14 concepts that have been thrown at you, ladies and
02:06:26 15 gentlemen, as a part of these instructions and what you've
02:06:28 16 heard since you appeared for jury duty this morning.

02:06:30 17 I'm going to define a lot of these words and
02:06:34 18 concepts for you as we go through these instructions. The
02:06:37 19 attorneys for both sides are going to discuss them in their
02:06:40 20 opening statements, and the witnesses are going to help you
02:06:43 21 through their testimony to understand these words and
02:06:46 22 concepts.

02:06:46 23 So, please, do not feel overwhelmed at this stage.
02:06:50 24 I promise you, it will all come together as we go through
02:06:53 25 the trial.

02:06:54 1 Now, one of your jobs in this case is to decide
02:06:58 2 whether or not the asserted claims have been infringed and
02:07:00 3 whether the claims are invalid.

02:07:02 4 If you decide that any of the asserted claims have
02:07:06 5 been infringed by the Defendant and are not invalid, then
02:07:10 6 you'll need to decide what amount of money damages should
02:07:13 7 be awarded to the Plaintiff as compensation for that
02:07:17 8 infringement.

02:07:18 9 Now, as I've said, my job is to tell you what the
02:07:22 10 law is, handle rulings on evidence and procedure, and to
02:07:25 11 oversee the conduct of the trial efficiently and to
02:07:29 12 maintain the decorum of the courtroom.

02:07:31 13 In determining the law, it's specifically my job
02:07:34 14 to determine the meaning of any claim language from within
02:07:38 15 the asserted patents that needs interpretation.

02:07:41 16 I've already determined the meanings of the claims
02:07:44 17 of the patents-in-suit, and you must accept the meanings or
02:07:48 18 interpretations that I give you and use those meanings when
02:07:52 19 you decide whether the asserted claims have or have not
02:07:56 20 been infringed.

02:07:58 21 And you're going to be given a document in a few
02:08:01 22 moments that reflects these meanings or constructions that
02:08:03 23 the Court has already reached, and that will be a part of
02:08:06 24 your juror notebooks that you'll receive shortly.

02:08:09 25 Now, for any term claim -- any language in the

02:08:12 1 claims for which I have not provided you with a definition,
02:08:16 2 then you should apply the plain and ordinary meaning of
02:08:19 3 that language.

02:08:20 4 If I have provided you with a definition, however,
02:08:24 5 you must apply the definition to those terms throughout the
02:08:27 6 case that I've given you.

02:08:29 7 However, my interpretation on the language of the
02:08:33 8 claims should not be taken by you as any indication that I
02:08:37 9 have a personal opinion or any opinion at all regarding the
02:08:40 10 issues such as infringement and invalidity. Those issues
02:08:44 11 are yours and yours alone to decide, ladies and gentlemen.

02:08:47 12 Now, I'm going to provide you with more detailed
02:08:52 13 instructions on the meanings of the claims before you
02:08:54 14 retire to deliberate on your verdict.

02:08:57 15 In deciding the issues that are before you, you'll
02:09:00 16 be asked to consider specific legal rules, and I'll give
02:09:03 17 you an overview of those rules now. And then at the
02:09:06 18 conclusion of the case, I'll give you more detailed
02:09:08 19 instructions.

02:09:09 20 The first issue that you will be asked to decide
02:09:12 21 is whether Wells Fargo has infringed the asserted claims.
02:09:18 22 And USAA, the Plaintiff, must show by a preponderance of
02:09:22 23 the evidence that the asserted claims have been infringed.

02:09:25 24 Now, there are a few different ways that a patent
02:09:28 25 can be infringed. I'll explain the requirements for each

02:09:31 1 of these types of infringement to you in detail at the
02:09:35 2 conclusion of the case but, in general, a Defendant may
02:09:39 3 infringe an asserted patent by making, using, selling, or
02:09:42 4 offering for sale in the United States or importing into
02:09:46 5 the United States a product meeting all the requirements of
02:09:50 6 a claim of the asserted patent or a product that practices
02:09:55 7 a method or process covered by the asserted patent.

02:09:59 8 And I'll provide you with more detailed
02:10:00 9 instructions on the requirements for infringement at the
02:10:03 10 conclusion of the case.

02:10:04 11 Now, the second issue that you are going to be
02:10:08 12 asked to decide is whether the asserted claims are invalid.

02:10:11 13 Invalidity, ladies and gentlemen, is a defense to
02:10:16 14 infringement. Therefore, even the PT -- even though the
02:10:19 15 PTO has allowed certain claims and even though an issued
02:10:23 16 patent is presumed to be valid, you, the jury, must decide
02:10:30 17 whether that claim is invalid after hearing the evidence
02:10:31 18 presented during the trial.

02:10:32 19 You may find a patent claim to be invalid for a
02:10:36 20 number of reasons, including because -- because it claims
02:10:40 21 subject matter that is not new.

02:10:43 22 For a patent to be invalid because it is not new,
02:10:47 23 the Defendant must show by clear and convincing evidence
02:10:51 24 that all of the elements of a claim are sufficiently
02:10:56 25 described in a single, previous printed publication or

02:10:59 1 patent. We call these items prior art.

02:11:02 2 If a claim is not new, it is said to be
02:11:06 3 anticipated by that prior art. You'll need to consider a
02:11:10 4 number of questions in deciding whether the invention
02:11:13 5 claimed in the asserted patents is anticipated. And I'll
02:11:18 6 provide you with more detailed instructions on these
02:11:21 7 questions at the conclusion of the trial.

02:11:23 8 Now, another way that a claim can be found to be
02:11:28 9 invalid is that it may have been obvious. Even though a
02:11:32 10 claim is not anticipated because every element of the claim
02:11:35 11 is not shown or sufficiently described in a single piece of
02:11:39 12 prior art, the claim may still be invalid if it would have
02:11:44 13 been obvious to a person of ordinary skill in the field of
02:11:47 14 the technology of the patent at the relevant time.

02:11:50 15 You'll need to consider a number of questions in
02:11:54 16 deciding whether the invention claimed in the asserted
02:11:58 17 patents is obvious, and I'll provide you with more detailed
02:12:00 18 instructions on these questions at the conclusion of the
02:12:03 19 trial.

02:12:03 20 One question you will need to consider in
02:12:07 21 determining whether a patent is anticipated or obvious in
02:12:11 22 light of the prior art is what references qualify as prior
02:12:16 23 art.

02:12:16 24 A reference is prior art if it predates the
02:12:22 25 priority date of the asserted patent. In this case,

02:12:25 1 however, the parties disagree about the priority date of
02:12:30 2 the patents-in-suit.

02:12:31 3 The Plaintiff, USAA, contends that the
02:12:33 4 patents-in-suit are entitled to a priority date of October
02:12:37 5 the 31st, 2006, because the inventions claimed by the
02:12:42 6 patents were conceived and diligently reduced to practice
02:12:46 7 by that date.

02:12:46 8 Wells Fargo, the Defendant, on the other hand,
02:12:50 9 denies this and contends that the patents-in-suit are only
02:12:54 10 entitled to a priority date of July the 28th, 2017, which
02:12:59 11 is the date that the patents were filed in this suit -- I'm
02:13:05 12 sorry, the patents in this suit were filed when the
02:13:08 13 applications were filed with the PTO.

02:13:09 14 It will be up to you to decide and determine the
02:13:14 15 priority date for each patent-in-suit and thus what
02:13:19 16 references qualify or don't qualify as prior art as to each
02:13:23 17 of these two patents. And I'll provide you with more
02:13:27 18 detailed instructions on these questions at the conclusion
02:13:30 19 of the trial.

02:13:31 20 Now, another way that a claim can be found to be
02:13:34 21 invalid is that there may be a lack of a written
02:13:39 22 description. A patent may be invalid if its specification
02:13:43 23 does not describe the claimed invention in sufficient
02:13:47 24 detail so that one skilled in the art can reasonably
02:13:50 25 conclude that the inventor actually had possession of the

02:13:53 1 invention that they're claiming.

02:13:55 2 You'll need to consider a number of questions in
02:13:58 3 deciding whether the patents-in-suit contain sufficient
02:14:02 4 written descriptions, and I'll provide you with more
02:14:04 5 detailed instructions on these questions at the conclusion
02:14:07 6 of the trial.

02:14:08 7 Now, if you find that the asserted claims have
02:14:13 8 been infringed, you'll need to decide then what amount of
02:14:16 9 money damages will be awarded to the Plaintiff, USAA, to
02:14:20 10 compensate it for that infringement, and that also pre --
02:14:25 11 predisposes that you find the patents-in-suit are not
02:14:29 12 invalid.

02:14:29 13 Now, a damage award must be adequate to compensate
02:14:34 14 the patentholder for the infringement, and damages may not
02:14:37 15 be less than what the patentholder would have received had
02:14:41 16 it been paid a reasonable royalty for the use of its
02:14:45 17 patents.

02:14:45 18 However, the damages that you award, if any, are
02:14:50 19 meant to compensate the patentholder, and they are not
02:14:53 20 meant to punish the Defendant or the infringer. You may
02:14:57 21 not include in any damages award an additional amount as a
02:15:02 22 fine or a penalty above what is necessary to fully
02:15:05 23 compensate the patentholder for the infringement.

02:15:10 24 Additionally, damages can't be speculative, and
02:15:15 25 USAA must prove the amount of its damages regarding the

02:15:18 1 alleged infringement by a preponderance of the evidence.

02:15:20 2 I'll give you more detailed instruction on the
02:15:24 3 calculation of damages for Defendant's alleged infringement
02:15:28 4 of the patents-in-suit at the conclusion of the trial by
02:15:31 5 giving you specific instructions regarding the calculation
02:15:35 6 of a reasonable royalty.

02:15:35 7 However, the fact that I'm instructing you on
02:15:40 8 damages does not mean that USAA is or is not entitled to
02:15:44 9 recover damages.

02:15:46 10 Now, ladies and gentlemen, you're going to be
02:15:49 11 hearing from a number of witnesses in this case over the
02:15:51 12 next several days, and I want you to keep an open mind
02:15:54 13 while you're listening to the evidence and not decide any
02:15:58 14 facts until you've heard all of the evidence.

02:16:00 15 This is important. While witnesses are
02:16:04 16 testifying, remember that you, the jury, will have to
02:16:09 17 decide and judge the degree of credibility and
02:16:12 18 believability to allocate to each of the witnesses and all
02:16:16 19 of the evidence that's presented during the trial.

02:16:19 20 So while the witnesses are testifying, you should
02:16:22 21 be asking yourselves things like: Does this witness
02:16:26 22 impress you as being truthful? Does he or she have a
02:16:30 23 reason not to tell the truth? Does he or she have any
02:16:33 24 personal interest in the outcome of the case? Does the
02:16:36 25 witness seem to have a good memory? Did he or she have an

02:16:41 1 ability and opportunity to observe accurately the things
02:16:44 2 that they testified about? Did the witness appear to
02:16:47 3 understand the questions clearly and to answer them
02:16:50 4 directly? And, of course, does the witness's testimony
02:16:53 5 differ from the testimony of any other witness? And if it
02:16:57 6 does, how does it differ?

02:17:00 7 These are some of the kinds of things that you
02:17:02 8 should be thinking about while you're listening to each and
02:17:04 9 every witness over the course of the trial.

02:17:06 10 I also want to talk to you briefly, ladies and
02:17:09 11 gentlemen, about expert witnesses. When knowledge of a
02:17:15 12 technical subject may be helpful to you, the jury, a person
02:17:18 13 who has special training and experience in that particular
02:17:20 14 technical field, we call them an expert witness, is
02:17:23 15 permitted to testify to you about his or her opinions on
02:17:28 16 those technical matters.

02:17:31 17 However, you're not to -- you're not required to
02:17:34 18 accept an expert witness's or any witness's opinions at
02:17:38 19 all. It's up to you to decide who you believe and whether
02:17:41 20 you believe an expert witness, or any witness for that
02:17:45 21 matter, and whether you believe what they're testifying to
02:17:47 22 is correct or incorrect, whether or not you want to believe
02:17:50 23 what they have to say.

02:17:52 24 Now, I anticipate that they're going to be expert
02:17:56 25 witnesses testifying in support of each side in this case.

02:17:59 1 But when they do, it will be up to you, the jury, to listen
02:18:03 2 to their qualifications, and when they give you an opinion
02:18:06 3 and explain the basis for it, you'll have to evaluate what
02:18:09 4 they say and whether you believe it and to what degree, if
02:18:17 5 any, you want to give that opinion weight.

02:18:19 6 Remember, ladies and gentlemen, judging and
02:18:23 7 evaluating the credibility and believability of each and
02:18:26 8 every witness is an important part of your job as jurors.

02:18:29 9 Now, during the course of the trial, it's possible
02:18:42 10 that there will be testimony from one or more witnesses
02:18:45 11 that are going to be presented to you through what we --
02:18:48 12 through what we call a deposition. In trials like this,
02:18:51 13 it's difficult to get all the witnesses together in the
02:18:55 14 same place at the same time so that they can testify in
02:18:58 15 person.

02:18:59 16 So lawyers for each side before the trial starts
02:19:05 17 take the depositions of the witnesses. In a deposition,
02:19:07 18 the witness is present, they are sworn and placed under
02:19:12 19 oath, a court reporter is present, and counsel for the
02:19:14 20 parties are present, at which time the witness is asked
02:19:18 21 questions and under oath answers those questions, and both
02:19:21 22 the questions and the answers are transcribed and taken
02:19:26 23 down.

02:19:26 24 Sometimes they are not only taken down in writing
02:19:30 25 but they are transcribed with a video recording, as well.

02:19:33 1 Portions of these recordings of the questions and
02:19:36 2 answers that have been asked at the deposition can be
02:19:39 3 played back to you as a part of the evidence in this trial
02:19:42 4 so that you can see the witness and hear their testimony,
02:19:46 5 even though they're not physically present and testifying
02:19:49 6 from the witness stand like live witnesses will.

02:19:52 7 Now, this deposition testimony, ladies and
02:19:54 8 gentlemen, is entitled to the same consideration and,
02:20:00 9 insofar as possible, is to be judged as to its credibility,
02:20:04 10 weight, and otherwise to be considered by you, the jury, in
02:20:08 11 the same way as if the witness had been present in person
02:20:12 12 and testified live from the witness stand in open court.

02:20:15 13 Now, over the course of the trial, it's possible
02:20:19 14 that the lawyers from time to time will make certain
02:20:23 15 objections, and when they do, I will issue rulings on those
02:20:26 16 objections.

02:20:26 17 It's the duty of an attorney to object when the
02:20:29 18 other side offers testimony or other evidence that the
02:20:33 19 attorney believes is not proper under the orders of the
02:20:36 20 Court or the rules of the Court, including the rules of
02:20:39 21 civil procedure -- civil procedure and the rules of
02:20:41 22 evidence.

02:20:41 23 Now, upon allowing the testimony or other evidence
02:20:45 24 to be introduced over the objection of an attorney, the
02:20:48 25 Court does not, unless expressly stated, indicate to you

02:20:52 1 any opinion about the weight or effect of such evidence.

02:20:56 2 As I've said before, you, the jury, are the sole judges of
02:21:01 3 the credibility and believability of all the witnesses and
02:21:04 4 the weight and effect to give to all of the evidence.

02:21:07 5 Now, I'd like to compliment the parties in this
02:21:10 6 case, both Plaintiff and Defendant, because today, they
02:21:14 7 have worked with the Court very diligently to go through
02:21:20 8 and review with the Court all the possible exhibits that
02:21:23 9 will be used during the course of this trial.

02:21:25 10 That means, ladies and gentlemen, that with the
02:21:27 11 parties' cooperation, the Court has already considered any
02:21:31 12 and all objections regarding the admissibility of exhibits
02:21:34 13 that will be used during the course of the trial, and the
02:21:36 14 Court has ruled on those objections so that you do not have
02:21:40 15 to sit here over the course of the next week and listen to
02:21:43 16 those objections being raised, argued, and then the Court
02:21:46 17 ruling on them one-by-one, and there have been hundreds of
02:21:50 18 exhibits presented in this case.

02:21:54 19 So whether you understand it or not, all the rest
02:21:56 20 of us have saved you a lot of time by taking that up and
02:22:00 21 dealing with that before we got to this point today with
02:22:02 22 you in the jury box. Through these pre-trial procedures,
02:22:06 23 the Court already made rulings about the admissibility of
02:22:10 24 all the exhibits, and this, I promise you, has saved you a
02:22:14 25 lot of time that has been achieved by the Court working

02:22:19 1 with the parties in advance of today. That's why I want to
02:22:24 2 commend the parties for their cooperation with the Court in
02:22:27 3 this regard.

02:22:27 4 What this means is, during the course of the
02:22:28 5 trial, when the parties show you an exhibit, it means I
02:22:30 6 have already ruled on the admissibility of it. And if I
02:22:34 7 have not approved its admissibility, you would not be
02:22:37 8 seeing it.

02:22:38 9 So they are simply able to show it to you without
02:22:41 10 going through the objection process because the Court's
02:22:43 11 already ruled on the admissibility, and it can be shown to
02:22:49 12 you and placed in its proper context without all the
02:22:52 13 predicate presentation that's otherwise required, because
02:22:55 14 we've already done that.

02:22:56 15 As I say, both sides have worked diligently to
02:22:59 16 streamline this process, and I promise you this will save
02:23:03 17 you a lot of time over the course of the next week.

02:23:05 18 However, it's still possible that over the course
02:23:08 19 of the trial, objections are going to arise during the
02:23:11 20 trial.

02:23:12 21 If I should sustain an objection to a question
02:23:15 22 addressed to a witness, then you must disregard the
02:23:19 23 question entirely, and you may draw no inference from its
02:23:23 24 wording or speculate about what the witness would have said
02:23:26 25 if I had allowed them to answer the question.

02:23:29 1 On the other hand, if I overrule an objection
02:23:34 2 addressed to a witness regarding a question, then you
02:23:38 3 should consider the question and the answer from the
02:23:40 4 witness just as if no objection had ever been made in the
02:23:43 5 first place.

02:23:44 6 Now, you should understand that the law of the
02:23:47 7 United States permits a United States District Judge to
02:23:50 8 comment to a jury, such as yourselves, regarding the
02:23:54 9 evidence in the case, but such comments by the judge on the
02:24:01 10 evidence are only an expression of the judge's opinion as
02:24:02 11 to that evidence, and the jury may disregard those comments
02:24:05 12 entirely. Because as I've told you, you, the jury, are the
02:24:10 13 sole judges of the facts in the case, you are the sole
02:24:14 14 judges of the credibility and believable -- believability
02:24:17 15 of the witnesses, and you are the sole judges as to how
02:24:21 16 much weight to give to all the testimony in the case.

02:24:23 17 Even though the law permits me to make such
02:24:29 18 comments to you, as I've indicated to you earlier, it's my
02:24:32 19 intention not to do that and to work very hard not to
02:24:34 20 comment on any of the evidence presented over the course of
02:24:37 21 this trial.

02:24:40 22 Now, in front of me is our court reporter,
02:24:42 23 Ms. Holmes, and she is taking down everything that is said
02:24:45 24 by anybody in this courtroom throughout the entire trial.
02:24:49 25 But the written transcription of everything that's said,

02:24:52 1 both questions and -- and answers and arguments made and
02:24:56 2 rulings by the Court, everything that's said, the
02:24:59 3 transcription of all of that is not going to be available
02:25:02 4 to you to take with you to the jury room and to review when
02:25:06 5 you consider the questions in the jury -- excuse me, in the
02:25:09 6 verdict form.

02:25:10 7 So as a consequence, ladies and gentlemen, you're
02:25:12 8 going to have to rely on your memories of the evidence
02:25:16 9 that's presented over the course of this trial.

02:25:19 10 In a moment, you're each going to be given a juror
02:25:22 11 notebook. You'll find in that notebook at the back a brand
02:25:26 12 new legal pad, and you'll find in the front pocket a brand
02:25:30 13 new pen that you may use to take notes over the course of
02:25:33 14 the trial with regard to the testimony and arguments that
02:25:36 15 are presented. It's up to each of you to decide whether or
02:25:39 16 not you want to take notes, and if you do, how detailed you
02:25:43 17 want your notes to be.

02:25:44 18 But if you take notes, remember, those notes are
02:25:47 19 for your own personal use, and you're going to still have
02:25:52 20 to rely on your memory of the evidence, and that's why you
02:25:55 21 should pay close attention to the testimony of each and
02:25:58 22 every witness.

02:25:59 23 You should not abandon your own recollection
02:26:01 24 because some other juror's notes indicate something
02:26:04 25 different. Notes are to reflect your recollection, and

02:26:10 1 that's the only reason you should be keeping them if you
02:26:12 2 decide to take notes over the course of the trial.

02:26:15 3 I'm now going to ask our Court Security Officer to
02:26:17 4 hand out these juror notebooks to each member of the jury
02:26:20 5 at this time.

02:26:49 6 In these notebooks, ladies and gentlemen, you'll
02:27:01 7 see that you each have a copy of each of the two asserted
02:27:04 8 patents that we've talked about. You'll also find that
02:27:07 9 there's a section of pages for each witness who may testify
02:27:10 10 during the course of the trial, including a picture of that
02:27:14 11 witness and their name to help you remember and recall
02:27:17 12 their testimony.

02:27:17 13 You'll also find a list of the terms from the
02:27:21 14 claim language that the Court has already defined, or
02:27:24 15 construed, and those constructions that you must use in
02:27:28 16 deciding the issues that are presented to you.

02:27:30 17 And as I've indicated, at the back, you'll find a
02:27:35 18 new unused legal pad for note taking, and there should be a
02:27:38 19 pen in the front cover if you don't already have one.

02:27:41 20 Now, those juror notebooks, ladies and gentlemen,
02:27:44 21 should be in your possession at all times. When you leave
02:27:48 22 for the day, you should take them to the jury room and
02:27:50 23 leave them closed on the table in the jury room, so that
02:27:53 24 they'll be there the next morning when you come back.
02:27:58 25 Otherwise, they should be in your possession.

02:28:00 1 Now, there may be times during the trial when
02:28:02 2 we're going to take a short recess, and I may simply say,
02:28:06 3 ladies and gentlemen, you may leave your notebooks in your
02:28:08 4 chairs. In that case, you can just close them and leave
02:28:11 5 them in your chairs, and they'll be there when you get back
02:28:14 6 from recess.

02:28:20 7 But unless I give you instructions to the
02:28:20 8 contrary, they should either be in your possession, or they
02:28:21 9 should be in the jury room on the table, not otherwise left
02:28:25 10 around or available for anybody who shouldn't see them to
02:28:25 11 see them.

02:28:26 12 Now, in a moment, the lawyers are going to present
02:28:30 13 their opening statements to you, the jury. These opening
02:28:35 14 statements are designed to give you a roadmap from each
02:28:37 15 side as to what they expect the evidence will show over the
02:28:42 16 course of the trial.

02:28:43 17 And you should remember, ladies and gentlemen,
02:28:45 18 throughout the trial, that what the lawyers tell you is not
02:28:48 19 evidence. I'll say that again. What the lawyers tell you
02:28:53 20 is not evidence.

02:28:54 21 The evidence is the sworn testimony that you're
02:28:58 22 going to hear from the witness stand from the witnesses who
02:29:01 23 are called to testify under oath and subject to
02:29:03 24 cross-examination. And the evidence are those exhibits
02:29:05 25 which the Court has reviewed for their compliance with the

02:29:09 1 rules of evidence and their admissibility and the Court has
02:29:12 2 admitted into evidence.

02:29:13 3 Those two things constitute the evidence in this
02:29:16 4 case. What the lawyers tell you is not evidence. What the
02:29:23 5 lawyers tell you is their impression of what the evidence
02:29:26 6 is. And they have a duty to point out to you what they
02:29:28 7 believe the evidence shows. But, remember, what they tell
02:29:32 8 you is not evidence.

02:29:33 9 Now, after the opening statements have been made,
02:29:37 10 the Plaintiff, as I told you during jury selection, will
02:29:41 11 then call its witnesses and put on what's called its
02:29:43 12 case-in-chief.

02:29:44 13 And after all the Plaintiff's witnesses have
02:29:47 14 testified, it will rest its case-in-chief, and then the
02:29:50 15 Defendant will do the same thing. The Defendant will call
02:29:53 16 its witnesses, present its evidence through what's called
02:29:57 17 the Defendant's case-in-chief.

02:29:58 18 When the Defendant rests or completes its
02:30:01 19 case-in-chief, then the Plaintiff has an opportunity to
02:30:04 20 call additional witnesses that are designated as rebuttal
02:30:08 21 witnesses, to rebut what the Defendants have shown.

02:30:10 22 If the Plaintiff calls rebuttal witnesses, when
02:30:13 23 those witnesses have finished testifying and the
02:30:17 24 Plaintiff's rebuttal case has been concluded, then you will
02:30:20 25 have heard all the testimony and the evidence in this case.

02:30:23 1 After you've heard all the evidence in this case,
02:30:28 2 I'll give you written instructions on the law as we've
02:30:31 3 talked about it, and I'll give you a copy of these written
02:30:36 4 instructions that I'll give to you orally at that time. In
02:30:39 5 other words, I will give you an oral rendition of my final
02:30:43 6 instructions to you, but you will have your own written
02:30:46 7 copy of the same instructions that you'll be able to take
02:30:48 8 to the jury room when you deliberate on your verdict.

02:30:52 9 These instructions that I'll give you, first
02:30:57 10 orally and then in written form, to take with you to the
02:31:00 11 jury room are called the Court's charge to the jury.

02:31:03 12 And after I've given you those instructions, those
02:31:06 13 final instructions, then the lawyers will be able to
02:31:10 14 present to you their closing arguments, which are designed
02:31:12 15 to point out to you what they believe they proved through
02:31:15 16 the evidence that's been presented over the course of the
02:31:18 17 trial.

02:31:18 18 And when you've heard closing arguments from both
02:31:20 19 Plaintiff and Defendant, then I'll instruct you to retire
02:31:23 20 to the jury room and to deliberate on your verdict.

02:31:25 21 Let me remind you one more time how critical it is
02:31:37 22 that you not discuss or communicate about this case with
02:31:40 23 anyone, including among the eight of yourselves, until such
02:31:43 24 time as you retire to the jury room at my instruction and
02:31:47 25 begin your deliberations. Then, you are required to

02:31:50 1 discuss the evidence you've heard over the course of the
02:31:53 2 trial among yourselves in attempting to reach a unanimous
02:31:56 3 decision on the questions set forth in the verdict form.

02:31:59 4 Let me also remind you, as I did earlier today,
02:32:04 5 that over the course of the trial when you come in close
02:32:06 6 contact with one or more members of each trial team or
02:32:10 7 witnesses or anyone associated with either side of this
02:32:13 8 case, they're not going to enter into conversation or speak
02:32:16 9 to you or be friendly, and that's not because they're rude.
02:32:19 10 It's simply because that's what the Court has required of
02:32:22 11 them.

02:32:23 12 And as I've indicated, it's because the sole
02:32:28 13 source of the information that you will ultimately draw on
02:32:34 14 to answer the questions in the verdict form must be limited
02:32:34 15 to the live testimony and deposition testimony that you
02:32:38 16 hear from witnesses under oath and subject to
02:32:41 17 cross-examination and the exhibits that the Court admits
02:32:45 18 into evidence. That must be the sole source and the sole
02:32:50 19 universe of the information that you draw on when you
02:32:53 20 consider and answer the questions in the verdict form.

02:32:57 21 All right. At this time, ladies and gentlemen,
02:32:59 22 we'll proceed to hear opening statements for the attorneys
02:33:01 23 for both of the parties.

02:33:04 24 Mr. Sheasby, you may now present your opening
02:33:07 25 statement for the Plaintiff.

02:33:08 1 MR. SHEASBY: May it please the Court.

02:33:14 2 THE COURT: Please proceed.

02:33:15 3 MR. SHEASBY: Good afternoon, ladies and gentlemen
02:33:17 4 of the jury. My name is Jason Sheasby. And I have been
02:33:20 5 asked to speak on behalf of USAA.

02:33:22 6 Let me begin by thanking you for your service. I
02:33:26 7 know each of you have obligations, each of you have things
02:33:29 8 that require doing, and this week you're giving your time
02:33:33 9 and your service to USAA, and we are very grateful.

02:33:37 10 I'd like to introduce myself. I was born in
02:33:41 11 California. I've lived my whole life in California. My
02:33:44 12 wife and I have two girls, and we also raise a niece and
02:33:48 13 nephew.

02:33:48 14 We are here because of patent infringement. And
02:33:55 15 the Court spoke about a very important constitutional
02:34:00 16 right, which is the right to a jury trial. But there's
02:34:02 17 another right that was actually enshrined in our
02:34:06 18 Constitution from the beginning.

02:34:08 19 231 years ago, the founders of our nation granted
02:34:12 20 and specified that the Congress of the United States would
02:34:17 21 allow and create patent rights. And the reason why our
02:34:20 22 founders did this was for a very particular reason. 231
02:34:24 23 years ago, they knew that this country would be strong and
02:34:28 24 powerful and protected if there was innovation. And the
02:34:32 25 way you protect innovation is through patent rights.

02:34:36 1 Patent rights are an absolute constitutional
02:34:42 2 right. And what that means is that when you file an
02:34:45 3 application with the United States Patent Office, anyone
02:34:50 4 can use the ideas in that patent application until
02:34:53 5 something occurs.

02:34:55 6 When the United States Patent Office grants you
02:34:58 7 your property right, when the United States Patent Office
02:35:02 8 grants you that patent, there is only two options. If
02:35:07 9 someone is using your inventions, they must either vacate
02:35:11 10 or they must seek permission. Those are the only two
02:35:14 11 options available to third parties, and the reason for that
02:35:18 12 is because the property right is absolute.

02:35:21 13 And we are here today because Wells Fargo is not
02:35:25 14 respecting that property right.

02:35:27 15 I'd like to introduce USAA to you. USAA was
02:35:32 16 founded in 1922 by 25 Army officers. And what they did is
02:35:37 17 they pooled substantial portions of their life savings
02:35:43 18 together to create a mutual insurance company. And what a
02:35:46 19 mutual insurance company means is that the members insure
02:35:50 20 themselves.

02:35:51 21 Now, much has changed since 1922, but some things
02:35:55 22 remain the same. To this day, USAA serves active military
02:35:59 23 members, honorably retired military members, and their
02:36:03 24 families.

02:36:03 25 And the second thing that has never changed is

02:36:07 1 that all of the money USAA has comes from its members.
02:36:13 2 Every dollar that was spent on the research and development
02:36:16 3 of this patent came from our members. Who are our members?
02:36:21 4 Our members are the members of the armed services, retired,
02:36:25 5 and their family who we serve.

02:36:27 6 Now, I want to talk briefly, and you'll hear much
02:36:32 7 more, about the invention at issue in this case. The
02:36:36 8 invention relates to the use of a powerful software system
02:36:40 9 to enable essentially any consumer device that has a
02:36:45 10 digital camera to capture a high quality image of a check
02:36:49 11 and to deposit in real-time.

02:36:50 12 Now, there's a paradox. Things that are
02:36:53 13 incredibly easy for humans are incredibly difficult for
02:36:58 14 computers and vice versa. So, for example, it's easy for
02:37:01 15 us to take a picture of a check, and it's easy for us to
02:37:04 16 interpret the information on that check. It's actually
02:37:06 17 incredibly hard for a computer to do that.

02:37:08 18 But a computer must do that because it's computers
02:37:14 19 that analyze and deposits the billions of checks each year
02:37:18 20 that are processed.

02:37:19 21 USAA focused on creating this disruptive
02:37:24 22 invention. And what I mean by disruptive is something that
02:37:27 23 has never been created before, consumer remote deposit
02:37:34 24 capture, using consumer devices. And there's this phrase
02:37:37 25 that people use. It's, necessity is the mother of

02:37:38 1 invention.

02:37:38 2 USAA serves military members throughout the world.

02:37:44 3 And in the 1980 -- in the 1980s, the military members asked

02:37:46 4 it to create a bank because they wanted cheap, low cost

02:37:49 5 banking. But there was a problem. USAA has no branches.

02:37:54 6 It has military members throughout the world, and it has no

02:37:57 7 branches.

02:37:58 8 So how do you solve that problem? Well, the way

02:38:01 9 they decided to solve the problem was by connecting their

02:38:03 10 members to them digitally. They would create what they

02:38:07 11 described as a virtual branch.

02:38:09 12 And consumer remote deposit capture was a critical

02:38:15 13 part of that virtual branch.

02:38:16 14 Now, they did something else which was very

02:38:19 15 important, which is they invested. USAA created an elite

02:38:27 16 Applied Research Division, and that elite Applied Research

02:38:28 17 Division was solely focused on creating next generation

02:38:31 18 technology that would serve their members.

02:38:35 19 The vision that was associated with this is

02:38:40 20 described in an email from Chuck Oakes. Chuck Oakes is an

02:38:45 21 inventor on these patents. He has over a hundred patents

02:38:48 22 to his name, and he is also the head of Applied Research

02:38:51 23 during the relevant time period. He's now retired from

02:38:54 24 USAA.

02:38:55 25 But you see in this effort from June 2006, he

02:38:58 1 said: This effort can and will revolutionize the banking
02:39:04 2 industry. I strongly believe that the effort of producing
02:39:07 3 this innovation is an example of what USAA is made of,
02:39:10 4 vision, strength, determination, member focused, and
02:39:14 5 commitment.

02:39:15 6 The Applied Research Division had this strong
02:39:19 7 vision of what they could create, and it turns out that
02:39:23 8 they were right. USAA's technology was widely heralded
02:39:32 9 throughout the United States as ground-breaking and
02:39:34 10 powerful.

02:39:35 11 This is AdAge. AdAge is a banking industry
02:39:39 12 publication. And it announces that USAA recently launched
02:39:45 13 mobile check deposit technology which let's users deposit
02:39:49 14 checks anywhere using an iPhone. This was the extension of
02:39:54 15 USAA's technology that occurred in 2009.

02:39:57 16 And what they say -- and this is very important --
02:40:00 17 they say USAA represents the leading edge of mobile banking
02:40:04 18 technology. Leading edge -- cutting edge and the leading
02:40:07 19 edge. USAA was at the forefront of this technology.

02:40:11 20 Counsel for Wells Fargo said something very
02:40:14 21 important. Listen. But listen to facts and listen to
02:40:20 22 documents. And the facts and documents make clear that
02:40:25 23 USAA was the first.

02:40:27 24 Now, it wasn't just banking industry publications.
02:40:30 25 It wasn't just publications from Texas. It was

02:40:33 1 publications from the East Coast recognized the powerful
02:40:37 2 nature of what USAA has created. In fact, The New York
02:40:41 3 Times talked about it.

02:40:42 4 So they got one thing wrong. They call us an
02:40:45 5 unlikely innovator. They know nothing about our Applied
02:40:50 6 Research Division. We're not an unlucky innovator. We
02:40:51 7 innovate all the time through our members.

02:40:53 8 But they got one thing right, and what they got
02:40:55 9 right is that three years ago in 2007 (sic), USAA
02:40:59 10 introduced the first version of consumer remote deposit
02:41:05 11 capture. And that laid the foundation for the
02:41:07 12 ground-breaking technology that's used today.

02:41:09 13 To this day, no one has created anything more
02:41:12 14 powerful. No one has created anything better than what
02:41:17 15 USAA's Applied Research Division envisioned in 2006.

02:41:20 16 This is one of the two patents at issue in this
02:41:26 17 case, and I can actually show you the official patents.
02:41:29 18 These are signed by the Commissioner of Patents, who's
02:41:31 19 confirmed by the United States Senate, and these are the
02:41:34 20 official documents that are sent to us when the Patent
02:41:38 21 Office grants our patents.

02:41:40 22 And the patents, you'll see, were originally filed
02:41:46 23 in 2006. And the applications at issue in this case were
02:41:48 24 filed in 2017. Now, I want to explain to you why that
02:41:53 25 happens.

02:41:53 1 In the United States patent system, you'll file an
02:41:58 2 original application. In this case, we filed the original
02:42:01 3 application in 2006. A patent was granted based on that
02:42:04 4 original application, but the laws of the United States
02:42:07 5 allow you to file additional applications that have the
02:42:11 6 same specification as the original patent but have
02:42:16 7 different claims. That's called a continuation
02:42:20 8 application, and that continuation application has the same
02:42:23 9 priority date as the original application in 2006.

02:42:26 10 And we did that, and we received additional
02:42:30 11 patents. And you can do it multiple times. And the
02:42:34 12 patents that are at issue today were patents that were
02:42:37 13 based -- that have that original specification from 2006,
02:42:39 14 and in 2017, we presented a set of claims to the United
02:42:44 15 States Patent Office and asked them to confirm that it
02:42:46 16 represented our constitutional property right.

02:42:50 17 And the patent examiners in this case, two
02:42:53 18 separate, independent patent examiners skilled in the
02:42:58 19 field, skilled in the law, both granted the property rights
02:43:03 20 at issue in this case.

02:43:04 21 The second patent at issue was the '605 patent.
02:43:08 22 It was also filed in 2006. And you'll see it's granted to
02:43:12 23 the United States Automobile Association.

02:43:16 24 Here's the timeline of events that have occurred.
02:43:19 25 In 2004, the research program began at USAA. In 2005, USAA

02:43:23 1 actually created its first working prototype using a common
02:43:27 2 consumer three-in-one copier, scanner, fax machine, printer
02:43:35 3 from Lexmark that was bought at Best Buy. We could use a
02:43:38 4 simple consumer device to allow the deposit of check
02:43:45 5 images.

02:43:45 6 The patent applications were filed in October of
02:43:49 7 2006 after we established the working system, and quickly
02:43:54 8 over time, we added new devices as they became popular. We
02:43:58 9 added Macintosh in 2007. We added an iPhone application in
02:44:02 10 2009. We added an Android application in 2010. We added
02:44:07 11 an iPad application in 2011. And in September of 2011,
02:44:11 12 recognizing the explosion of consumer devices that had
02:44:15 13 digital cameras, USAA enabled technology so that any -- any
02:44:19 14 consumer device you have, if it can go on the Internet and
02:44:23 15 if it has a digital camera, we can use it.

02:44:27 16 And that relates to something very powerful, a
02:44:31 17 value of USAA, which is we meet our members where they are.
02:44:35 18 And what I mean by that is we don't force them to buy
02:44:39 19 expensive devices, we don't force them to work with us, we
02:44:42 20 work with them. We use what they have to create this
02:44:45 21 powerful tool.

02:44:46 22 The application at issue in this case became
02:44:50 23 publicly available to anyone who wanted to read it in 2011.
02:44:56 24 Anyone could read it at that point.

02:44:58 25 The other application at issue in this case became

02:45:01 1 publicly available in 2014. At that point, anyone could
02:45:05 2 read it. But in 2018 when the patents were granted, there
02:45:12 3 was only one option available to Wells Fargo, vacate or
02:45:17 4 seek permission.

02:45:18 5 So the Judge explained that you have a jury
02:45:22 6 notebook, and I explained to you that what's most important
02:45:30 7 is facts, not argument from lawyers. And you see this
02:45:33 8 little yellow box down in the corner, that is an exhibit
02:45:36 9 number, and you can write down exhibit numbers. And in
02:45:40 10 your deliberations, you can ask for them because they're
02:45:43 11 evidence. They're not just argument.

02:45:44 12 And the evidence, I will respectfully submit to
02:45:49 13 you, speaks loudly.

02:45:50 14 Where was Wells Fargo while USAA was innovating?
02:45:55 15 Well, in 2009, they were watching. They actually report on
02:46:01 16 USAA's use of its Deposit@Home system with iPhone, and they
02:46:06 17 note how popular it is. Over a few months of time, over
02:46:11 18 40,000 customers had already used this.

02:46:13 19 This is an internal document at Wells Fargo. It's
02:46:17 20 for Wells Fargo's executives. It's confidential. But we
02:46:20 21 were able to obtain it through this litigation process.

02:46:22 22 Now, why was Wells Fargo interested in what USAA
02:46:30 23 was doing? Well, the reason is that Wells Fargo had made a
02:46:39 24 mistake. They had decided to invest in a system in which
02:46:46 25 its businesses, they called it the CEO system, could

02:46:50 1 deposit checks using specialized scanning machines. This
02:46:55 2 only does one thing. It cost hundreds of dollars at the
02:46:59 3 time, and all it would do is image checks.

02:47:04 4 But after USAA had invented consumer remote
02:47:09 5 deposit capture system, they quickly realized their system
02:47:14 6 was unacceptable. It was useless. Consumers would not buy
02:47:18 7 a specialized scanner machine. Consumers wanted to use the
02:47:22 8 devices they had available. And over time, the pressure
02:47:26 9 increased on Wells Fargo.

02:47:26 10 In January of 2010, now USAA had over 125,000
02:47:34 11 downloads of its application. It was the No. 1 ranked --
02:47:40 12 8th ranked application in popularity among finance
02:47:44 13 applications on the iPhone. And the internal confidential
02:47:46 14 advice is that mobile RDC would play an important
02:47:50 15 transformative role in the bank. It got more intense.

02:47:55 16 In 2011, the internal reports to the company was
02:47:58 17 that MRDC was table stakes. I'm not a gambler. This is a
02:48:02 18 gambling term that Wells Fargo is using. Table stakes
02:48:06 19 means you must have it to be able to sit at the table. The
02:48:09 20 internal records from Wells Fargo's executives made clear
02:48:13 21 they must have remote deposit check capture consumer based
02:48:20 22 services. They must have it.

02:48:21 23 THE COURT: 15 minutes have been used, counsel.

02:48:24 24 MR. SHEASBY: But there was another problem. In
02:48:25 25 the candid advice to their executives, Wells Fargo made

02:48:28 1 clear in PX-14 that they did not have the internal ability
02:48:31 2 to create their own research and development program. They
02:48:35 3 were already years behind USAA, and it would take them
02:48:38 4 another nine to 18 months to build their own. And what's
02:48:43 5 worse, they had no R&D capability to sustain it, unlike
02:48:46 6 USAA's Applied Research division that continued to sustain
02:48:49 7 the system year after year after year.

02:48:51 8 In August of 2010, a candid report to Wells
02:48:59 9 Fargo's executives described the benefits of the USAA
02:49:03 10 system. The incredible value to the bank, cost savings,
02:49:10 11 deposit growth, people would actually deposit more money in
02:49:14 12 the bank if they had mobile remote deposit capture.
02:49:22 13 Acquisition tool and cross-sell, people would use more of
02:49:22 14 the bank's services if they had mobile remote deposit
02:49:24 15 capture and the WOW/innovation factor. Wells Fargo wanted
02:49:29 16 to be known as an innovator.

02:49:31 17 What did they do, on the left, is the 2010
02:49:36 18 assessment of the USAA system. On the right is the
02:49:40 19 confidential plan of what Wells Fargo was going to do, and
02:49:49 20 it lists them doing the exact same thing that USAA's system
02:49:54 21 was doing.

02:49:54 22 Wells Fargo wanted what USAA had. Wells Fargo
02:50:01 23 couldn't create what USAA had. Wells Fargo coveted USAA's
02:50:06 24 Applied Research division.

02:50:08 25 Now, let's do the timeline for Wells Fargo. In

02:50:13 1 2006, USAA launched our -- launches its system. In 2009 to
02:50:18 2 2010, the system was fully built out such that any consumer
02:50:22 3 device with a digital camera and a down -- that could
02:50:25 4 download an application or access the Internet could use
02:50:28 5 it. The patents were published first in January of 2011.
02:50:34 6 And after the publication of those patents, Wells Fargo
02:50:37 7 launched its own system. And since 2012 to today, Wells
02:50:43 8 Fargo has continued to use that system.

02:50:46 9 Now, let me be clear, the law is the law. From
02:50:50 10 the publication of that application to the grant of our
02:50:51 11 property right, Wells Fargo had the right to use our ideas.
02:50:56 12 But the moment the United States Patent Office granted our
02:51:00 13 property right, it had only two options, vacate or seek
02:51:06 14 permission.

02:51:07 15 The record will show that USAA actually in
02:51:10 16 December of 2016 told the public that its mobile remote
02:51:15 17 deposit capture system was protected by the families of
02:51:19 18 patents at issue in this case. Remember, the Judge told
02:51:22 19 you about earlier patents that were in the same family. We
02:51:25 20 marked our application, our mobile app with the patent
02:51:30 21 family numbers so that folks would know that this was our
02:51:34 22 property right.

02:51:35 23 In 2017 to 2018, we actually approached Wells
02:51:42 24 Fargo about licensing. The PTO granted the rights in July
02:51:47 25 of 2018. Once the rights were granted, we promptly filed

02:51:51 1 this suit, and here we are today.

02:51:54 2 The only damages we seek is for the period of time
02:52:00 3 the United States Patent Office granted our patents, and
02:52:02 4 that is the issues and the facts that we -- what we believe
02:52:06 5 the facts will show.

02:52:07 6 There are four questions you will be asked to
02:52:11 7 consider. The first is infringement. Infringement is
02:52:14 8 USAA's burden, and it's a burden by a preponderance of the
02:52:18 9 evidence. And that means we must show if the Scales of
02:52:23 10 Justice tip ever so slightly in our favor, USAA prevails.

02:52:28 11 And in addition, for infringement, there's no
02:52:31 12 intent or knowledge or recklessness required. This is a
02:52:35 13 constitutional property right. It's strict liability. It
02:52:36 14 doesn't matter if it was an accident. It doesn't matter if
02:52:39 15 they were shocked to find out that we had a patent. If
02:52:43 16 they're using our patent, they have an obligation.

02:52:47 17 I'll show you an example claim. We will map the
02:52:49 18 claim to each element of Wells Fargo's system. It
02:52:53 19 describes the use of a general purpose computer and a
02:52:56 20 digital camera. It describes the use of a downloaded
02:52:59 21 application that will control the system. It describes the
02:53:02 22 use of image assessment. And we will march through Wells
02:53:06 23 Fargo's source code, the instructions for their system, and
02:53:10 24 establish that each of these elements are present in the
02:53:15 25 system. We will show you the code, the actual code.

02:53:18 1 You'll note that the claims refer to a general
02:53:29 2 purpose computer and a digital camera. That's what the
02:53:32 3 system is. You'll also note that Wells Fargo's own
02:53:35 4 witnesses can see that the iPhones and the Android phones
02:53:38 5 that they use, what are they, they're general purpose
02:53:40 6 computers with digital cameras.

02:53:41 7 Wells Fargo has infringement defenses, lots of
02:53:49 8 defenses, lots of excuses, I would submit. One of those is
02:53:53 9 that, oh, well, we do things different than USAA. We do
02:53:58 10 something called OCR on the system, not on the phone, and
02:54:02 11 the claims require that it occur on the phone, not the
02:54:06 12 system.

02:54:06 13 But the claims, you will see, describe a system
02:54:10 14 for deposit. They describe the use of a customer's
02:54:14 15 handheld device. They describe the use of a computer
02:54:18 16 associated with the bank, separate from the handheld
02:54:20 17 device. And they describe that the system performs image
02:54:27 18 quality analysis.

02:54:27 19 Now, Wells Fargo will tell you, oh, no, we don't
02:54:30 20 infringe because the phone doesn't do the image quality
02:54:34 21 analysis. We do that at our servers. But they're
02:54:38 22 contradicting the language of the claims that say -- and
02:54:41 23 this is an important insight that USAA found -- to create
02:54:44 24 the power, to create the processing power that's necessary,
02:54:50 25 we don't just use the phone. We use a distributed system

02:54:52 1 that uses both the phones and servers.

02:54:55 2 There's another argument that Wells Fargo makes.
02:54:57 3 Wells Fargo said, oh, we're not the ones doing the
02:55:00 4 infringement. No, no, no, no, no, it's our customers.
02:55:04 5 It's our customers that are doing the infringement. They
02:55:07 6 call it a divided infringement problem.

02:55:11 7 Wells Fargo will argue that they don't benefit
02:55:14 8 from each and every element of the claims, and, therefore,
02:55:16 9 they shouldn't be held liable. That's an argument they
02:55:18 10 will make to you.

02:55:19 11 Ladies and gentlemen of the jury, the facts will
02:55:22 12 establish that every single time a Wells Fargo customer
02:55:25 13 deposits a check using the system, Wells Fargo saves at a
02:55:29 14 minimum one dollar, and Wells Fargo is going to argue that
02:55:33 15 they're not responsible for the system, and they don't
02:55:36 16 benefit from each of these elements.

02:55:38 17 The second issue you'll be asked to decide is
02:55:41 18 validity. Validity is Wells Fargo's burden. Validity
02:55:46 19 requires clear and convincing evidence of invalidity.

02:55:50 20 Now, you may ask yourself why is that fair? Why
02:55:53 21 does USAA have to only show infringement by 51 percent but
02:55:58 22 Wells Fargo must show invalidity by a much stricter burden?

02:56:04 23 Well, the answer is the following: There actually
02:56:07 24 is an independent third party who looked at these patents.
02:56:11 25 It's the United States patent examiners. There were two of

02:56:14 1 them. They were trained in the art. They analyzed the
02:56:17 2 applications, and they determined that they were valid.
02:56:20 3 And it's because of that effort by the expert, trained
02:56:24 4 patent examiners that we're entitled to the presumption of
02:56:28 5 validity.

02:56:29 6 Now, to be clear, we should look at the evidence,
02:56:38 7 and you will ask yourself, did the trained patent
02:56:41 8 examiners, expert in this field, get it wrong?

02:56:45 9 One of Wells Fargo's arguments is they say, oh,
02:56:48 10 well, you don't disclose consumer devices or mobile devices
02:56:52 11 or portable devices that have digital cameras. You don't
02:56:56 12 disclose that limitation in your specification.

02:56:58 13 And you'll see here on the left-hand side it talks
02:57:01 14 about an image and processing system for use with a digital
02:57:07 15 camera or a portable device.

02:57:10 16 But the actual language in the specification
02:57:10 17 describes exactly that. It describes the vision of USAA
02:57:11 18 from 2006 onwards, the use of electronics that consumers
02:57:15 19 actually owned with digital cameras.

02:57:19 20 It describes the use of cellular networks with
02:57:22 21 cellular phones. It actually describes the use of various
02:57:26 22 digital devices including PDAs.

02:57:28 23 What are PDAs? In 2006, PDAs were a combination
02:57:33 24 of general purpose computers, cameras, and wireless
02:57:39 25 capability. The insight that USAA had from the beginning

02:57:42 1 and is reflected in these claims is that any device could
02:57:47 2 be used. We would meet our members where they were.

02:57:49 3 The third question you'll be asked to decide is
02:57:51 4 willfulness. The facts will establish that beginning in
02:57:55 5 2010, even before our patent was public, Wells Fargo had
02:58:00 6 found out that we had published -- that we had filed
02:58:04 7 applications on our mobile remote deposit capture system.
02:58:07 8 This is testimony from Alan Hecht. He's their corporate
02:58:11 9 representative, and he admitted it under oath.

02:58:13 10 We were also able to access Wells Fargo's records,
02:58:19 11 their confidential records.

02:58:21 12 THE COURT: Five minutes remaining.

02:58:23 13 MR. SHEASBY: And what we found -- what we found
02:58:26 14 was an internal experimentation with USAA's application,
02:58:30 15 and we actually found -- looking at the patent marking
02:58:34 16 page. This is from our application, that red arrow
02:58:39 17 pointing to our patents, that's a red arrow that they
02:58:43 18 added, not us. It was in their records.

02:58:45 19 The fourth issue you'll be asked to decide is
02:58:47 20 damages. The record will show that solely from the damages
02:58:50 21 period, Wells Fargo has generated 1.2 billion in profits
02:58:53 22 from the use of this system -- 1.2 billion in profits.

02:58:56 23 And we will ask for a reasonable royalty of no
02:59:00 24 less than 85 cents per successful mobile deposit. We're
02:59:06 25 asking for less than they make every single time they use

02:59:09 1 this system.

02:59:11 2 At the beginning of this conversation, I talked
02:59:14 3 about one constitutional right, the right to a patent as
02:59:18 4 property. I now want to go back to the other
02:59:21 5 constitutional right that Judge Gilstrap had, and I'd like
02:59:23 6 you to think about it in a different way.

02:59:26 7 So we talk about jury service. We talk about jury
02:59:28 8 duty. We talk about the fact that USAA has a right to a
02:59:32 9 jury. But it's also your right. When the founders of our
02:59:37 10 nation created this Constitution, they said that citizens
02:59:40 11 get to decide the important questions.

02:59:43 12 This is not just your duty. This is your right.
02:59:48 13 It's your power. You have the authority to make a decision
02:59:51 14 in this profoundly important matter.

02:59:53 15 Ladies and gentlemen of the jury, thank you for
02:59:55 16 your time and thank you for your service.

03:00:04 17 MR. MELSHEIMER: May we approach briefly, Your
03:00:05 18 Honor?

03:00:05 19 THE COURT: Approach the bench.

03:00:07 20 (Bench conference.)

03:00:20 21 THE COURT: What's the problem?

03:00:21 22 MR. MELSHEIMER: Your Honor, I want to raise a
03:00:22 23 potential motion in limine violation. Remember, back in
03:00:25 24 chambers, we talked about the slides where we'd objected to
03:00:30 25 them as arguing copying. And the Plaintiffs said, no, no,

03:00:33 1 we're going to argue commercial success.

03:00:36 2 And what he did when those slides were up is he
03:00:40 3 used the term "coveted." He said Wells Fargo wanted and
03:00:44 4 coveted what he was saying they had. I think that's a
03:00:47 5 violation of the Court's MIL. He didn't seek leave to do
03:00:50 6 that.

03:00:50 7 And, in fact, it was represented that those slides
03:00:52 8 were going to be used for a different purpose.

03:00:54 9 THE COURT: What's your response, Mr. Sheasby?

03:00:56 10 MR. SHEASBY: Your Honor, covet is not the same as
03:00:58 11 copy. That slide was clearly directed at the commercial
03:01:03 12 value of the technology, and there was no suggestion
03:01:05 13 whatsoever made. It's not done in the willfulness section.
03:01:09 14 It was not done when we were talking about the use of our
03:01:12 15 application. I don't believe there's been any violation of
03:01:15 16 our MIL.

03:01:16 17 THE COURT: All right. I'm going to overrule the
03:01:18 18 objection.

03:01:19 19 Let's proceed with --

03:01:19 20 MR. MELSHEIMER: Thank you, Your Honor.

03:01:20 21 THE COURT: -- opening statement.

03:01:25 22 MS. WILLIAMS: Thank you, Your Honor.

03:01:26 23 (Bench conference concluded.)

03:01:28 24 THE COURT: All right. The Defendant may now
03:01:30 25 present its opening statement to the jury.

03:01:33 1 Ms. Williams, you may proceed.

03:01:35 2 MS. WILLIAMS: May it please the Court.

03:01:37 3 This case is about respecting the rules, what the
03:01:39 4 law gives and also what it requires.

03:01:41 5 My name is Danielle Williams, and I represent
03:01:46 6 Wells Fargo. Let me tell you a little bit about myself, as
03:01:49 7 you did earlier today.

03:01:50 8 I'm born and raised in North Carolina. I live
03:01:52 9 there in my hometown with my husband -- he's a lawyer,
03:01:57 10 too -- and our two boys. My parents live there, too. They
03:02:00 11 celebrated their 50th wedding anniversary last year.

03:02:04 12 Last week, one son got his driver's license and
03:02:10 13 the other one finished driver's ed. Getting a driver's
03:02:16 14 license has given me the opportunity to teach my sons about
03:02:20 15 something I think is really important, respect. Respect
03:02:23 16 for people, respect for processes, and respect for rules.
03:02:27 17 They may not like sitting in 30 hours of driver's ed class,
03:02:34 18 and they may not like logging 60 hours of supervised
03:02:41 19 driving, but they will respect the process and the rules
03:02:44 20 for getting a driver's license.

03:02:45 21 This case is about respect. And in the time I
03:02:49 22 want to -- in the time I have with you today, I want to
03:02:52 23 talk with you about three things.

03:02:54 24 First, I want to talk with you about respect for
03:02:59 25 property rights and their lawful extent, respect for the

03:03:04 1 process and place to assess those property rights, and,
03:03:09 2 lastly, respect for the value of those specific property
03:03:12 3 rights.

03:03:12 4 It can be frustrating when there isn't enough
03:03:17 5 respect. We've seen trials on TV where lawyers are overly
03:03:21 6 dramatic, levelling accusations at each other, using sound
03:03:27 7 bytes, plain old-fashioned yelling. They take things out
03:03:33 8 of context. They use the sound bytes, and that's good for
03:03:37 9 drama, but it's not good for getting us to the truth.

03:03:44 10 And in that situation, it's not what Judge
03:03:46 11 Gilstrap so eloquently described earlier today about our
03:03:51 12 jury trial, tracing it from the Old Testament to the Magna
03:03:55 13 Carta to the Declaration of Independence, and finally to
03:03:58 14 our Constitution.

03:04:03 15 Respect is why we stand up for you when you come
03:04:03 16 in. It's why we stand up for Judge Gilstrap when he comes
03:04:08 17 in. And it's why we will call everyone Dr., Mr., Mrs.
03:04:12 18 during trial this week.

03:04:13 19 So let's talk first about respect for property
03:04:17 20 rights. Our Constitution gives Congress the power to pass
03:04:24 21 laws relating to patents. The right to a patent is not a
03:04:28 22 constitutional right. It's a right that is created by
03:04:31 23 Congress and subject to the rules laid out by the Patent
03:04:34 24 Office that we must respect.

03:04:36 25 You heard about some of those in the video today,

03:04:39 1 as well as from Judge Gilstrap. And as we heard and see on
03:04:42 2 the screen, a patent is an official grant by the United
03:04:48 3 States Government of exclusive rights to the invention
03:04:50 4 claimed in the patent.

03:04:52 5 Nothing less, but nothing more.

03:04:58 6 The law doesn't favor these exclusive rights or
03:05:03 7 monopolies, and for good reason. Monopolies can make
03:05:07 8 things more expensive for everybody and can hurt
03:05:11 9 competition.

03:05:11 10 So the patent law requires -- requires that your
03:05:16 11 patent monopoly must be limited to what you specifically
03:05:20 12 described in your patent and not a square inch more than
03:05:25 13 that.

03:05:25 14 Just like the deed to a piece of property
03:05:31 15 describes the boundaries of the -- of the landowner's
03:05:34 16 property, the patent claims describe the boundaries of the
03:05:37 17 patent owner's property.

03:05:39 18 The landowner and the patent owner are limited to
03:05:44 19 what they described in their patent and described in their
03:05:49 20 deed.

03:05:50 21 The application submitted to the Patent Office
03:05:53 22 includes what is called a specification. Judge Gilstrap
03:05:56 23 talked with us about that earlier today. And the law
03:06:00 24 requires that the specification contain a written
03:06:04 25 description of the claimed invention telling what the

03:06:06 1 invention is.

03:06:10 2 And this is true for the two patents that are
03:06:12 3 asserted in this case against Wells Fargo. The '605 patent
03:06:17 4 and the '681 patent, both are in your notebooks.

03:06:20 5 So let's look at the first page of these two
03:06:24 6 patents. Here we have them on the screen. The first page
03:06:28 7 tells us that both patents issued on July 3rd, 2018, just a
03:06:35 8 few weeks before USAA filed this lawsuit on August 17th,
03:06:40 9 2018.

03:06:42 10 The first page also tells us that USAA filed both
03:06:48 11 applications on July 28th, 2017, and claimed that they were
03:06:58 12 continuations of some old, earlier filed -- earlier filed
03:07:02 13 applications from Halloween of 2006.

03:07:05 14 So dates are important in this case. So let's
03:07:07 15 look at these dates and some other ones on a timeline.

03:07:12 16 USAA just told you that they claimed these patents
03:07:17 17 filed in July 2017 and issued in July 2018 get the benefit
03:07:24 18 of the filing date of some old patents -- patent
03:07:29 19 applications filed in October 2006.

03:07:35 20 And as you can see, that is more than 10 years.
03:07:38 21 There's a 10-year gap between the October 2006 application
03:07:45 22 and the July 2017 application.

03:07:51 23 A lot can happen in 10 years. The evidence will
03:07:56 24 show the first iPhone was available in 2007. Wells Fargo
03:08:03 25 was the first bank to offer mobile banking in 2007. Wells

03:08:07 1 Fargo began offering mobile deposit in 2012, right along
03:08:14 2 with the rest of the industry, and years before USAA filed
03:08:16 3 for the patents asserted in this case in July of 2017.

03:08:19 4 Now, you might ask yourself, how can USAA file
03:08:28 5 patents in 2017 and claim they invented it in 2006? Well,
03:08:36 6 the law allows USAA to file new applications on these old
03:08:43 7 original applications but only if -- only if those 2006
03:08:52 8 specifications describe the full scope of the invention in
03:08:57 9 the new claims.

03:08:57 10 That means for USAA to get the benefit of the
03:09:02 11 October 31st, 2006, date, the original 2006 applications
03:09:09 12 have to include a written description of the invention
03:09:14 13 claimed in the 2018 patent.

03:09:18 14 The law will not allow claims to something that
03:09:23 15 was not written down.

03:09:27 16 The evidence will show USAA did not write down in
03:09:32 17 2006 what they claimed to invent in 2018. The claims in
03:09:36 18 the 2018 patents for the first time -- for the first time
03:09:41 19 talk about using a mobile device with a digital camera for
03:09:46 20 check deposit.

03:09:47 21 But none of that specificity was or ever has been
03:09:52 22 in those October -- was or have -- none of that specificity
03:09:57 23 was or ever has been in those October 2006 applications.

03:10:01 24 The old 2006 specifications only describe using a
03:10:09 25 desktop or a laptop computer connected to a separate camera

03:10:15 1 or scanner. And as you see on our timeline, this is from
03:10:19 2 Figure 1 of both the '605 and the '681 patents. This is
03:10:24 3 all that is described.

03:10:25 4 You'll have the chance to look at the 2006
03:10:30 5 specifications which are the same as the 2018
03:10:34 6 specifications.

03:10:35 7 If you look at the '605 patent, for example,
03:10:37 8 everything from where the pictures start to the beginning
03:10:42 9 of the claims on the second to the last page is the
03:10:48 10 specification from 2006. The first page and the claims are
03:10:54 11 the new part from 2017. And it's the same for the '681
03:11:00 12 patent.

03:11:00 13 So what happened between October 2006 and July
03:11:12 14 2017? Well, the iPhone happened. Mobile banking happened.
03:11:19 15 Mobile deposit happened. And not just at Wells Fargo. The
03:11:23 16 evidence will show USAA and its witnesses claim October
03:11:31 17 2006 as their invention date. But without the written
03:11:32 18 description and the 2006 specifications, USAA can't claim
03:11:36 19 these more than 10 years of innovation as its own.

03:11:41 20 The patent laws don't allow an inventor to add or
03:11:44 21 expand claims. Just like we can't expand our property line
03:11:48 22 to include our neighbor's new house, we can't secure a
03:11:52 23 Lotto ticket after the winning numbers have been announced.

03:11:57 24 Here we are limited to the property rights
03:12:01 25 described in the deed originally before the new house was

03:12:06 1 built, before the Lotto winner was announced, and before
03:12:11 2 banking moved to mobile phones.

03:12:14 3 The evidence will show that in 2006, USAA didn't
03:12:19 4 write down what it is now claiming its invention is. So
03:12:23 5 its 2018 patents are not valid.

03:12:31 6 Well, so what is USAA saying about this? Well,
03:12:33 7 we've heard from USAA. They're pointing to PDAs as it's
03:12:41 8 used in the '605 patent. PDA is an old term, personal
03:12:46 9 digital assistant. And in 2006, they weren't smartphones,
03:12:49 10 and they weren't mobile phones. More importantly, the '605
03:12:54 11 patent mentions PDAs exactly two times.

03:12:58 12 And here we see those two times on the screen.
03:13:02 13 And the context is important. We talk -- the patent talks
03:13:08 14 about PDAs in the context of network or distributed
03:13:15 15 computing environment, and in the same breath as MP3
03:13:21 16 players and televisions.

03:13:26 17 The context is important in life, and it's
03:13:29 18 important in patent law. And when we look at the context
03:13:32 19 here, we see PDAs are in the same list as MP3 players and
03:13:39 20 televisions.

03:13:40 21 The '605 patent doesn't say MP3 players or PDAs
03:13:46 22 and televisions have cameras, and it doesn't say that PDAs
03:13:53 23 and MP3 players and televisions are used for check deposit.
03:14:01 24 And the '605 patent is about check deposit.

03:14:02 25 What about the '681 patent? Well, it doesn't

03:14:07 1 mention PDAs at all. So when you look at what they're
03:14:12 2 pointing to, PDAs, and we think about it in the context,
03:14:21 3 the specifications from 2006 did not include what they're
03:14:22 4 trying to claim today.

03:14:26 5 Now, as you heard in the video, the patent system
03:14:31 6 works because the inventor is required to describe the
03:14:34 7 invention in clear and specific terms so that the public
03:14:39 8 knows what the boundaries of the invention are.

03:14:44 9 And the evidence will show that USAA is claiming
03:14:44 10 it wrote down its invention in 2006. But there's nothing
03:14:49 11 in the 2006 specification to support that. It's not enough
03:14:53 12 to find the word PDA, like it's a game of word search. The
03:15:00 13 rules require USAA to write down the invention in clear and
03:15:04 14 specific terms, and the evidence will show they didn't do
03:15:09 15 that.

03:15:09 16 That leads me to respect for the process, the
03:15:15 17 process in place to assess property rights. The video that
03:15:19 18 Judge Gilstrap showed you, the Federal Judicial Center
03:15:23 19 created that just for you, especially for you, to explain
03:15:29 20 why there are disputes about patents that require your
03:15:33 21 help. You are a critical part of the process.

03:15:37 22 As Mr. Hill talked with you about earlier today,
03:15:40 23 as well, a part of the process that we greatly respect. As
03:15:45 24 the video told us, a party accused of infringement is
03:15:48 25 entitled to challenge the accusation of infringement and is

03:15:52 1 entitled to challenge the patentability of the patent.
03:15:55 2 These aren't excuses as USAA suggested. This is the
03:16:03 3 process in place to assess the property rights that we must
03:16:06 4 respect.

03:16:09 5 We heard also in the video why you're being asked
03:16:13 6 to review these questions. Here, prosecution of a patent
03:16:19 7 application takes place without input from other people.
03:16:24 8 And so it's important to give other people the opportunity
03:16:27 9 to challenge it in court.

03:16:29 10 And, second, of course, of course, there's an
03:16:37 11 opportunity for mistakes to be made and for information to
03:16:41 12 be overlooked. As we learned -- as the video told us,
03:16:46 13 examiners have a lot to work -- a lot of work to do, and no
03:16:51 14 process is perfect.

03:16:52 15 Just like the law allows us to contest the
03:17:03 16 property tax bills from the county appraisal district that
03:17:07 17 Mr. Hill talked with you about earlier today, anyone
03:17:11 18 accused of infringement is entitled to contest -- to
03:17:16 19 contest the accusation of infringement and to contest the
03:17:19 20 validity of that patent, and that process includes you.

03:17:22 21 Of course, mistakes can be made and information
03:17:27 22 can be overlooked by the Patent Office. Your role in the
03:17:29 23 process is to be the check and balance on that Patent
03:17:32 24 Office. The evidence will show mistakes were made here,
03:17:36 25 and catching and fixing those mistakes is exactly what our

03:17:39 1 patent system includes and depends on this very proceeding.

03:17:44 2 So let's go back to our timeline. The evidence
03:17:49 3 will show USAA paid to put the patent applications on
03:17:53 4 Track 1, meaning the Patent Office had to act on them
03:17:59 5 within a year. You heard in the video that it takes an
03:18:01 6 average of three years for the Patent Office to act on a
03:18:04 7 patent.

03:18:04 8 Here in the one year preceding -- in the one --
03:18:17 9 the evidence will show that during the one year preceding,
03:18:18 10 the Patent Office gave no express indication that they
03:18:21 11 looked at the 2006 specifications to confirm or to see
03:18:25 12 whether mobile phones were described during that one-year
03:18:29 13 process.

03:18:29 14 Now, in response, we heard, well, there were two
03:18:31 15 patent examiners who reviewed that and who issued the
03:18:37 16 patents. Well, but that doesn't answer the debate. That
03:18:43 17 doesn't end the discussion. Here Wells Fargo is entitled
03:18:49 18 to challenge the patentability because mistakes can be made
03:18:52 19 and because information can be overlooked, and that's
03:18:55 20 exactly why we are here and why you are part of the process
03:19:02 21 to be the check and balance on the Patent Office.

03:19:04 22 You will have the opportunity to see those old
03:19:06 23 2006 specifications for yourself and use your common sense
03:19:11 24 to determine what is in there and what is not in there.

03:19:14 25 Respect for the process includes giving you the

03:19:17 1 information through documents and witnesses so you can
03:19:20 2 decide for yourself, and that is our plan to give you the
03:19:25 3 information.

03:19:29 4 In addition to the absence of written description,
03:19:32 5 Wells Fargo is going to present evidence that mobile
03:19:38 6 deposit does not infringe the patents. USAA cannot prove
03:19:41 7 that Wells Fargo Mobile Deposit practices every element of
03:19:45 8 the claims that they're asserting.

03:19:46 9 So for the '681 patent, the claims require that
03:19:51 10 certain things happen on the mobile phone, including OCR,
03:19:54 11 or optical character recognition. And the OCR must be
03:20:02 12 performed of the amount. OCR is a -- an old technology
03:20:09 13 from the 1980s. It is technology that allows a computer to
03:20:13 14 read the words and numbers on a document as the document is
03:20:18 15 being scanned.

03:20:19 16 Here -- here, the evidence will show that Wells
03:20:24 17 Fargo's system does not do what the claims require as far
03:20:28 18 as OCR of the check amount.

03:20:31 19 The evidence will also show that as to the '605
03:20:35 20 and the '681 patents, that USAA cannot prove infringement
03:20:38 21 because of the way that they chose to write its claims.
03:20:41 22 And you'll hear a lot more of that later.

03:20:43 23 Members of the jury, sometimes in a patent case,
03:20:51 24 as was mentioned in the video, jurors may feel that they
03:20:57 25 are somehow not qualified enough or lack expertise to judge

03:21:00 1 technical issues. And there are three reasons why that
03:21:07 2 should not be of any concern for you in this case.

03:21:10 3 First, much of what you need to decide in this
03:21:14 4 case is in your notebooks. The 2006 specification does not
03:21:18 5 include what USAA is trying to claim their invention is
03:21:23 6 today.

03:21:24 7 Second, we have brought you experts who will talk
03:21:28 8 with you about the technical issues, and they will be able
03:21:31 9 to explain to you all of the technology in a way that can
03:21:37 10 be understood by all.

03:21:40 11 And, third, you will be able to assess the
03:21:43 12 credibility and the believability of the witnesses that
03:21:45 13 come before you based on your common sense, your own
03:21:49 14 experiences, and your judgment about who can be trusted and
03:21:53 15 who you need to be a little more cautious about.

03:21:56 16 Lastly, let's talk about respect for the value of
03:22:00 17 the property rights. The evidence will show that the
03:22:07 18 patents are not valid and not infringed, but out of respect
03:22:10 19 for the process, as Mr. Hill told you earlier, Wells Fargo
03:22:13 20 will present evidence about the value of any legitimate
03:22:18 21 invention in the patents. To be clear, the law allows USAA
03:22:21 22 to be compensated for the value of what it actually
03:22:28 23 invented and nothing more, and in this case, no earlier
03:22:32 24 than August 2018 when it filed its lawsuit.

03:22:39 25 Here the evidence will show USAA is trying to

03:22:42 1 broaden its invention to capture the value of things that
03:22:46 2 already existed in 2006. USAA is claiming the value of
03:22:52 3 pre-existing technologies -- other people's property as its
03:22:56 4 invention. So how -- how do we know that?

03:23:01 5 Well, you didn't hear much of this from USAA in
03:23:04 6 its opening, but you'll hear from their damages expert,
03:23:08 7 Mr. Weinstein, and he believes that the value of the
03:23:12 8 inventions in these patents are fraud prevention and fraud
03:23:16 9 detection. And he relies on another USAA witness,
03:23:21 10 Mr. Calman. I'm not sure whether you'll hear from him or
03:23:25 11 not in this case.

03:23:26 12 But they say that the value of the patents is
03:23:31 13 fraud prevention and fraud detection. But when you look at
03:23:34 14 those patents, you won't see the word fraud, you won't see
03:23:39 15 the words fraud prevention, and you won't see the words
03:23:44 16 fraud detection.

03:23:44 17 One kind of fraud prevention is called duplicative
03:23:49 18 detection. It's what banks use to make sure the same check
03:23:55 19 isn't deposited twice, whether by mistake or intentionally.
03:23:59 20 And there are many ways to do it, and the evidence will
03:24:02 21 show that Wells Fargo has been using duplicate detection
03:24:04 22 for decades, even before October 2006.

03:24:07 23 But Wells Fargo began as a bank in the 1850s. As
03:24:12 24 you might imagine, a bank that's been around for nearly 170
03:24:16 25 years has many customers across the United States. Wells

03:24:22 1 Fargo has over 5,500 branches, over 13,000 ATMs across the
03:24:27 2 United States to serve its customers, including members of
03:24:34 3 the armed forces, but Wells Fargo serves everybody.

03:24:36 4 In addition to these physical locations, Wells
03:24:39 5 Fargo offers online banking, and the evidence will show
03:24:45 6 that Wells Fargo was -- was first in Internet banking,
03:24:48 7 first in remote deposit capture, and first in mobile
03:24:55 8 banking.

03:24:55 9 Wells Fargo has never been sitting on the
03:24:57 10 sidelines. It has never been watching for innovation.
03:25:01 11 Wells Fargo has been an innovator and an innovator in
03:25:08 12 online technology since the beginning.

03:25:09 13 Now, let me introduce you to one of Wells Fargo's
03:25:12 14 engineers Mr. Byron Chun.

03:25:14 15 Mr. Chun, will you please stand up? Thank you.

03:25:20 16 Mr. Chun has been a software engineer for 23 years
03:25:25 17 at Wells Fargo. In 2004, Mr. Chun created an online
03:25:29 18 website for Wells Fargo for its customers to use with an
03:25:32 19 existing scanner so they could deposit checks without
03:25:36 20 having to go to the branch and deposit them in person.
03:25:40 21 This service is called Desktop Deposit.

03:25:43 22 By March 2005, Desktop Deposit was launched
03:25:50 23 nationwide, and it is still in use today. At the time,
03:25:54 24 Desktop Deposit was available in 2004. Duplicate
03:25:57 25 detection, amount verification, customer authentication,

03:26:02 1 logging, endorsement checking, these fraud prevention --
03:26:11 2 these fraud prevention measures were already in place at
03:26:16 3 the time Desktop Deposit was made nationwide in 2005.

03:26:18 4 So all of the fraud benefit -- excuse me, all the
03:26:22 5 fraud prevention and detection benefits that USAA points to
03:26:26 6 as the value of these patents was already in place at least
03:26:34 7 by 2005 when this Desktop Deposit was launched nationwide.

03:26:39 8 THE COURT: You have five minutes remaining.

03:26:42 9 MS. WILLIAMS: Thank you, Your Honor.

03:26:42 10 Now, USAA may point to the language and the claim
03:26:44 11 that duplicate detection is performed. Well, the patent
03:26:47 12 claims don't describe any particular approach or method for
03:26:50 13 duplicate detection, just that it occurs. And so let me
03:26:54 14 give you an illustration.

03:26:57 15 And here we have on the screen a patent that
03:27:00 16 has -- or is not a patent. It has never been issued. But
03:27:05 17 just to give you an illustration of what I'm talking about.

03:27:07 18 If you got a patent on landing on the moon and the
03:27:09 19 first step was getting into a rocket ship, the second is
03:27:14 20 flying the rocket ship to the moon and the second is
03:27:16 21 landing on the moon, well, that second step, flying the
03:27:19 22 rocket ship, is a little more complicated than just flying
03:27:23 23 the rocket ship.

03:27:25 24 And that's exactly what we have here. We've got
03:27:28 25 duplicate detection and these other fraud prevention

03:27:32 1 methods just simply stated in the patent. But there's no
03:27:36 2 description of any new method. It can just be any old way
03:27:39 3 of doing those.

03:27:42 4 Now, we're surprised in this case to hear that
03:27:49 5 USAA is saying Wells Fargo should pay for the benefit of
03:27:51 6 duplicate detection and these other features, especially
03:27:57 7 since Wells Fargo has been doing duplicate detection and
03:27:59 8 these other fraud prevention measures since well before the
03:28:02 9 patent applications were filed, and certainly before 2006.

03:28:07 10 And since USAA didn't actually do any of the work
03:28:14 11 inventing any of those fraud prevention features, and we're
03:28:18 12 certainly surprised to hear Wells Fargo -- excuse me, hear
03:28:21 13 USAA say that the inventions are worth over a hundred
03:28:25 14 million dollars and 85 cents per deposit because the
03:28:28 15 evidence will show we're not using it. USAA didn't invent
03:28:30 16 these fraud prevention features. And nobody, nobody has
03:28:34 17 ever paid USAA to license these patents.

03:28:38 18 Here, USAA is trying to take credit for work it
03:28:43 19 didn't do and for value it doesn't provide.

03:28:48 20 So let's talk about what happens now. USAA is
03:28:51 21 going to go first and present its witnesses. As Mr. Hill
03:28:54 22 mentioned this morning, we will have the opportunity to
03:28:57 23 cross-examine them. We will respect your time by bringing
03:29:01 24 out information that's important to our case.

03:29:03 25 Now, some questioning will be longer and others

03:29:07 1 will be shorter, but we will take the time to bring out the
03:29:11 2 information that's important to this case.

03:29:13 3 Then we will present our witnesses, and let me
03:29:17 4 just take a minute to introduce a few of those I expect you
03:29:20 5 may meet this week if time permits.

03:29:23 6 So Mr. Al Hecht, will you please stand up?

03:29:26 7 So Mr. Hecht has spent nearly his 35-year career
03:29:32 8 all in check processing. He has been at the forefront of
03:29:35 9 all check processing technology during his career. And I
03:29:39 10 think you will be surprised to hear what USAA is claiming
03:29:43 11 in this case after you hear from Mr. Hecht.

03:29:46 12 Mr. Bill Saffici, will you please stand up?

03:29:51 13 Mr. -- thank you.

03:29:53 14 Mr. Saffici will talk with you about why the
03:29:55 15 patents are invalid and what he has looked at. He has
03:29:59 16 spent his entire 50-year career in check processing, and I
03:30:04 17 think that you will find him very refreshing. He has
03:30:10 18 hands-on experience all of those 50 years, and will be --
03:30:13 19 bring that practical objective perspective to you.

03:30:15 20 Dr. Villasenor, will you please stand up? Thank
03:30:22 21 you.

03:30:22 22 This is Dr. Villasenor. He has taught me the
03:30:24 23 technology in this case, and he will teach you the
03:30:27 24 technology in this case as well.

03:30:29 25 And then, lastly, Mr. Chris Gerardi, will you

03:30:35 1 please stand up? Thank you.

03:30:37 2 Mr. Gerardi has over 25 years experience in
03:30:40 3 valuing patents, and he will talk with you about the proper
03:30:44 4 measure of damages, if any, in this case.

03:30:47 5 Members of the jury, this case is about respect
03:30:50 6 for rules. If you didn't write down your invention in
03:30:56 7 2006, you can't claim it in 2018. If you can't prove
03:31:01 8 infringement element-by-element, then you haven't proven
03:31:07 9 infringement. It's that simple.

03:31:10 10 Thank you for your time, and we look forward to
03:31:12 11 presenting our case to you.

03:31:16 12 THE COURT: All right. Ladies and gentlemen of
03:31:19 13 the jury, you've now heard the opening statements from both
03:31:21 14 Plaintiff and Defendant.

03:31:23 15 Before we proceed with the Plaintiff's
03:31:24 16 case-in-chief and they call their first witness, we're
03:31:27 17 going to take a short recess.

03:31:29 18 This is one of those times when you can simply
03:31:31 19 close your juror notebooks and leave them in your chairs.
03:31:34 20 My intention is to have you back shortly, and we'll
03:31:37 21 continue then with the Plaintiff's first witness.

03:31:39 22 Remember, during this recess, not to discuss the
03:31:41 23 case among yourselves. Follow all the instructions I've
03:31:44 24 given you. Get a drink of water, stand up, shake your legs
03:31:48 25 around, and then come back in, and we'll continue with the

03:31:51 1 Plaintiff's first witness.

03:31:52 2 The jury is excused for recess.

03:32:11 3 (Jury out.)

03:32:14 4 THE COURT: Be seated, please.

03:32:19 5 Off the record.

03:32:34 6 (Pause in proceedings.)

03:32:34 7 THE COURT: Back on the record.

03:32:37 8 Couple of things. I know that Judge Payne denied

03:32:42 9 granting an order in limine on describing and making

03:32:47 10 reference to the PTO. I just heard enough of making them

03:32:54 11 angels and devils at the same time to lead me to tell you

03:32:57 12 all I don't want to hear about the expert, trained

03:33:00 13 examiners who are flawless anymore, on the PTO. And I

03:33:04 14 don't want to hear about the crazy, sloppy, they're always

03:33:07 15 wrong examiners, from the other side, of the PTO. I do not

03:33:11 16 want to hear descriptions or characterizations of the

03:33:14 17 United States Patent and Trademark Office or its examiners

03:33:17 18 any further in this trial unless you come and get prior

03:33:20 19 permission from me at the bench. All right?

03:33:23 20 I'm, in effect, granting that order in limine from

03:33:26 21 the bench now because of what I heard from both sides

03:33:29 22 during opening statements.

03:33:30 23 Secondly, I want to remind Defendants of something

03:33:35 24 we talked about in chambers this morning when I precluded

03:33:40 25 them from using a demonstrative slide under their written

03:33:43 1 description defense that called for a requirement of an
03:33:47 2 integrated camera which I struck and told them they
03:33:51 3 couldn't use that slide with that language in it because
03:33:53 4 that was really a description of the product, not the claim
03:33:57 5 language.

03:33:57 6 Your written description defense is going to have
03:34:00 7 to hew to the claim language, not to the products that may
03:34:03 8 have presented themselves in the marketplace later. You
03:34:06 9 can't take old language and then say because some new
03:34:10 10 product that we say falls within that broad language isn't
03:34:16 11 fitting the description, then we win on written
03:34:17 12 description. You're going to have to live or die by the
03:34:19 13 language of the claims and not any products or their
03:34:22 14 descriptions or their absence from the actual language in
03:34:26 15 the specification.

03:34:27 16 And I want to reiterate that on the record, and
03:34:30 17 I'm doing it now, because I see a tendency for the
03:34:32 18 Defendants to go away from the claim language and toward
03:34:38 19 products that are beyond the scope of the claim language
03:34:41 20 with regard to this written defense -- written description
03:34:44 21 defense. And I want to make it crystal clear on the record
03:34:47 22 that that's not permissible, and I'm going to instruct the
03:34:49 23 Defendants to avoid that going forward.

03:34:54 24 I thought we covered that off the record in
03:34:56 25 chambers this morning, but I am concerned about that,

03:35:00 1 having heard the opening arguments that I just heard.

03:35:02 2 All right. With those clarifications, we're going
03:35:04 3 to take about a five-minute recess, then we'll come back in
03:35:06 4 and proceed with Plaintiff's first witness.

03:35:08 5 The Court stands in recess.

03:35:11 6 COURT SECURITY OFFICER: All rise.

03:35:12 7 (Recess.)

03:46:04 8 (Jury out.)

03:46:05 9 COURT SECURITY OFFICER: All rise.

03:46:06 10 THE COURT: Mr. Sheasby, the Plaintiff's first
03:46:08 11 witness is Brady; is that correct?

03:46:09 12 MR. SHEASBY: Yes, Your Honor.

03:46:10 13 THE COURT: What's your expected time for direct
03:46:12 14 examination?

03:46:13 15 MR. SHEASBY: An hour and 15 minutes, Your Honor.

03:46:14 16 THE COURT: All right. And, Mr. Hill, you're
03:46:16 17 going to cross?

03:46:18 18 MR. HILL: I am, Your Honor.

03:46:19 19 THE COURT: What's your best guess on time to
03:46:22 20 cross?

03:46:22 21 MR. HILL: It could be 60 to 90 minutes, Your
03:46:26 22 Honor.

03:46:26 23 THE COURT: How long is the Oakes deposition, both
03:46:30 24 designations and counters, estimated?

03:46:41 25 MS. GLASSER: 18 minutes.

03:46:42 1 MR. SHEASBY: 18 minutes.

03:46:43 2 THE COURT: It doesn't look like we're going to
03:46:45 3 get to Mr. Conte today. I understand that we have disputes
03:46:48 4 that are still unresolved. We'll have to do that either
03:46:51 5 after I send the jury out or tomorrow morning.

03:46:51 6 My -- my question was calculated to determine
03:46:56 7 whether we realistically were going to get to Conte today
03:46:58 8 or not. It does not look like it.

03:47:01 9 Anybody see it differently?

03:47:03 10 MR. HILL: No, sir.

03:47:03 11 MR. SHEASBY: No, Your Honor.

03:47:04 12 THE COURT: Okay.

03:47:04 13 MR. SHEASBY: Your Honor, there are a couple of
03:47:05 14 issues, with your permission.

03:47:07 15 THE COURT: All right. What have you got?

03:47:08 16 MR. SHEASBY: One, we would like to invoke the
03:47:10 17 Rule, if you would allow us to do so.

03:47:15 18 THE COURT: I intend to ask you that as soon as we
03:47:16 19 get the jury back in the box.

03:47:16 20 MR. SHEASBY: The second issue is, we did want to
03:47:17 21 flag two issues relating to limine. One, that we had an
03:47:21 22 express agreement in front of Judge Payne that Wells Fargo
03:47:25 23 would only say there are no licenses to the asserted
03:47:28 24 patents.

03:47:28 25 THE COURT: You need to go to the podium,

03:47:30 1 Mr. Sheasby. When you turn and look at your notes and
03:47:32 2 start talking, I don't hear you.

03:47:34 3 MR. SHEASBY: I apologize.

03:47:35 4 We had an express agreement with Judge Payne that
03:47:38 5 the only description of licensing was, quote, no licenses
03:47:42 6 to the asserted patents. Counsel referred to no one has
03:47:46 7 paid for a license to the asserted patents. And may -- I
03:47:49 8 understand you made -- it is of particular sensitive to us,
03:47:54 9 and we just request that the actual language that Judge --
03:47:57 10 Judge Payne used be used in the future. That's our first
03:48:00 11 concern.

03:48:01 12 The second concern is that there was reference
03:48:03 13 made to a fast-track process, that the Patent Office only
03:48:08 14 had a year to -- to conduct the examination, and I don't
03:48:12 15 believe that's proper. This is not about angels versus
03:48:16 16 devils. I take the Court's admonition, but that was
03:48:19 17 clearly not proper to suggest that somehow the Patent
03:48:24 18 Office -- this got railroaded through or that because we
03:48:27 19 used this procedure, that there was something improper.
03:48:30 20 And there was reference to that in the opening.

03:48:33 21 I'm not so concerned -- I don't want to ask for a
03:48:36 22 curative instruction at this point, but I am concerned that
03:48:38 23 it will continue in Mr. Brady's deposition --
03:48:44 24 cross-examination.

03:48:44 25 And then the third issue that I have is there was

03:48:47 1 reference to monopolies increasing the prices on -- on
03:48:50 2 customers.

03:48:50 3 And, once again, I don't want a limine
03:48:54 4 instruction, but that has no place in this case to suggest
03:48:58 5 that somehow this patent right is going to increase cost on
03:49:01 6 customers. I don't think that's a proper argument. And --
03:49:04 7 and I would just want to state for the record my objection
03:49:06 8 to those three points, Your Honor.

03:49:07 9 THE COURT: All right.

03:49:17 10 MR. HILL: May I respond, Your Honor?

03:49:19 11 THE COURT: You may respond briefly.

03:49:20 12 MR. HILL: Thank you.

03:49:21 13 Your Honor, with regard to the licenses issue,
03:49:24 14 that's cutting it pretty thin. He's seeking to
03:49:28 15 micromanage, not keep a skunk out of the jury box, the
03:49:32 16 purpose of a limine, but micromanage how the same fact is
03:49:34 17 delivered to the jury.

03:49:35 18 Saying the patents have not been licensed or no
03:49:37 19 one has licensed or no one has paid USAA for a license,
03:49:41 20 Your Honor, all state the same fact. None in a more
03:49:46 21 inflammatory way than another.

03:49:49 22 And so we would ask for the freedom to try our
03:49:50 23 case, both having different perspectives, since that
03:49:53 24 doesn't implicate any concerns that ought to be of concern
03:49:54 25 to confusing or creating some unfairness properly for a

03:49:58 1 limine issue.

03:49:59 2 On the fast-track issue, Your Honor -- fast track
03:50:01 3 was not said -- let's be clear about that -- in the opening
03:50:05 4 statement. What was said is that they were given Track
03:50:09 5 1 -- a Track 1 request was made and that that required that
03:50:11 6 it occur within a year.

03:50:12 7 Your Honor, part of our defense, properly so, is
03:50:15 8 that we believe a mistake was made. We have to say that.
03:50:19 9 We -- we get to say that. And as part of common sense,
03:50:24 10 when things happen faster, sometimes mistakes are made.
03:50:27 11 That's the whole basis of the -- of putting that forward
03:50:30 12 for the jury to consider. It's also a plain fact of record
03:50:34 13 that appears in the prosecution history.

03:50:37 14 And so we don't believe there's anything improper
03:50:39 15 about pointing out the timeline as part of the holistic
03:50:44 16 picture of the issuance of these patents.

03:50:46 17 Final issue, Your Honor, on the issue of
03:50:49 18 monopolies, the Georgia-Pacific factors reference the
03:50:53 19 patent monopoly. The patent videos themselves discuss this
03:50:56 20 exclusive right. It is what it is. There's nothing
03:50:57 21 pejorative about discussing that a patent is a monopoly.

03:51:03 22 And if -- so beyond that, there's been references
03:51:05 23 by both parties to cost associated with -- they say it
03:51:09 24 saves us lots of money. As such, that, you know, it saves
03:51:12 25 consumers money, saves -- and for us to suggest that the

03:51:16 1 patent monopoly -- a patent monopoly in the abstract used
03:51:20 2 improperly could drive up prices is not improper.

03:51:24 3 THE COURT: All right. Well, I don't want to hear
03:51:31 4 any more argument. There was an agreement worked out
03:51:34 5 before Judge Payne during the pre-trial process on precise
03:51:37 6 language. I want that precise language used.

03:51:40 7 MR. HILL: And, Your Honor, that's where I
03:51:41 8 quarrel. I don't believe that there is a stipulation of
03:51:44 9 precise language before Judge Payne. Judge Payne said,
03:51:46 10 when we asked, can we say that the patents have never been
03:51:51 11 licensed, he said, yeah. It wasn't as if we stipulated to
03:51:55 12 a text of a stipulation.

03:51:56 13 THE COURT: All right. Then I'll give you a
03:51:57 14 stipulation right now or I'll give you guidance right now.

03:52:00 15 You can say that there are no licenses. You're
03:52:03 16 not going to say that someone didn't pay for a license.
03:52:07 17 The language you're -- both sides will use is that there
03:52:11 18 are -- there is not a license. Simple fact. Don't
03:52:19 19 characterize it. Don't put the word "paid," "rejected,"
03:52:19 20 "offered," no characterization. Simply the statement,
03:52:21 21 there are no -- there is no license. And that's how I want
03:52:25 22 it handled from this point forward.

03:52:28 23 Part of my instruction after the jury left for
03:52:41 24 recess after openings with regard to denigrating the PTO
03:52:45 25 had to do with this Track 1 or fast-track process. It's

03:52:49 1 clear that these patents were submitted to the PTO under
03:52:53 2 that Track 1 procedure.

03:53:03 3 But at this point I do not and I'm not going to
03:53:03 4 permit a characterization of that procedure as inherently
03:53:05 5 flawed or -- or error-ridden or some other denigrating way
03:53:11 6 to describe it. It is what it is. These applications were
03:53:14 7 submitted under it. And that's all that needs to be said
03:53:18 8 about that process.

03:53:19 9 That doesn't preclude the Defendant from saying
03:53:22 10 they think the Patent Office made a mistake. You have the
03:53:25 11 right to say you think they made a mistake and to show why
03:53:28 12 you think they made a mistake.

03:53:31 13 But you don't get to say that the application
03:53:32 14 process is somehow rushed up, hurried, imprecise, improper,
03:53:39 15 inefficient, ineffective, whatever adjective you can put
03:53:44 16 with it. I don't want to characterize the fast-track or
03:53:47 17 Track 1 process other than identify it for what it is.

03:53:51 18 Then separate and apart from that, if there's an
03:53:54 19 argument about a mistake made and a substantive basis for
03:53:56 20 it in the evidence, then we'll cross that bridge when it
03:54:00 21 comes to closing arguments about how you characterize it.
03:54:02 22 All right?

03:54:03 23 MR. HILL: Your Honor, just out of -- out of full
03:54:05 24 disclosure -- well, I'll bring this up, Your Honor, after
03:54:09 25 we see Mr. Brady's direct examination.

03:54:12 1 THE COURT: If there are any questions about
03:54:14 2 following my instructions, come to the bench for
03:54:18 3 clarification.

03:54:18 4 MR. HILL: Yes, sir.

03:54:18 5 THE COURT: That goes to both sides.

03:54:20 6 And with regard to the monopoly character of a
03:54:23 7 patent as raising prices for consumers, that's -- that's no
03:54:31 8 more proper than the old arguments if you pay this much per
03:54:35 9 this component, then the price of your cell phone is going
03:54:38 10 to be \$10,000.00. Those arguments are -- are not proper.
03:54:44 11 They never have been.

03:54:45 12 There is a -- there is a monopoly characteristic
03:54:48 13 inherent for a set term as a part of the patent issuance
03:54:52 14 process. We all know that. That's a fact. It doesn't
03:54:55 15 need to be characterized. It doesn't need to be attributed
03:54:58 16 to higher prices or consumer impacts or anything either
03:55:03 17 overtly positive or overtly negative. It needs to be
03:55:07 18 stated as a fact, if it's stated at all, but not
03:55:10 19 characterized.

03:55:10 20 MR. HILL: Thank you, Your Honor. And just --
03:55:11 21 just to make sure, because our goal, Your Honor, of course,
03:55:14 22 is to stay on the right side of everything with you, and so
03:55:18 23 I want to make sure that the issue is not saying the word
03:55:21 24 monopoly. Are you telling us we can say that or we cannot
03:55:25 25 say that, I just want to be clear.

03:55:27 1 THE COURT: As long as you're describing the
03:55:28 2 characteristics of an issued patent as granting a -- a
03:55:36 3 monopoly for a limited time.

03:55:37 4 MR. HILL: Yes, sir. Yes, sir. That's all I
03:55:39 5 wanted to clarify.

03:55:39 6 THE COURT: But that's all.

03:55:40 7 MR. HILL: Thank you.

03:55:41 8 THE COURT: All right. Any questions about that
03:55:43 9 guidance from either Plaintiff or Defendant?

03:55:44 10 MR. SHEASBY: Nothing from Plaintiffs, Your Honor.

03:55:46 11 MR. MELSHEIMER: Well-understood, Your Honor.

03:55:48 12 THE COURT: All right. Mr. Sheasby, this is your
03:55:51 13 witness. You can go to the podium and prepare.

03:55:54 14 While you're doing that, you can bring in the
03:55:56 15 jury, please.

03:56:28 16 (Jury in.)

03:56:28 17 THE COURT: Welcome back, ladies and gentlemen.
03:56:33 18 Please be seated.

03:56:33 19 Counsel, does either party wish to invoke the Rule
03:56:37 20 at this time?

03:56:37 21 MR. SHEASBY: Plaintiffs wish to invoke the Rule,
03:56:40 22 Your Honor.

03:56:40 23 THE COURT: All right. Is this request, counsel,
03:56:45 24 to exclude expert witnesses?

03:56:47 25 MR. SHEASBY: It is not, Your Honor, only fact

03:56:50 1 witnesses.

03:56:52 2 THE COURT: No, the request to invoke the Rule
03:56:54 3 would exclude its application to expert witnesses.

03:56:57 4 MR. SHEASBY: Yes, Your Honor.

03:56:58 5 THE COURT: That's what I thought you meant.

03:57:00 6 Okay. The Rule has been invoked. That means
03:57:03 7 unless you are a corporate representative, a designated
03:57:06 8 expert witness, then you are to excuse yourself from the
03:57:12 9 courtroom and remain outside until you're called, which
03:57:15 10 categorically should leave fact witnesses -- fact witnesses
03:57:19 11 as those that are covered by the invocation of the Rule
03:57:21 12 here.

03:57:22 13 So if you're a fact witness in this case and
03:57:24 14 you're not an expert witness and you're not a corporate
03:57:27 15 representative, then you should excuse yourself and remain
03:57:30 16 outside until you're called to testify, and then only be
03:57:33 17 present in the courtroom during your testimony.

03:57:35 18 For the record, the Rule on that basis has been
03:57:38 19 invoked.

03:57:39 20 MR. SHEASBY: Thank you, Your Honor.

03:57:40 21 THE COURT: All right. Plaintiff, call your first
03:57:43 22 witness.

03:57:43 23 MR. SHEASBY: Your Honor, Plaintiffs call their
03:57:46 24 first witness, Mr. John Brady, USAA's corporate
03:57:49 25 representative.

03:57:49 1 THE COURT: All right. If you'll come forward and
03:57:51 2 be sworn by our courtroom deputy, please, Mr. Brady.

03:57:57 3 (Witness sworn.)

03:57:58 4 THE COURT: Please come around, sir. Have a seat
03:58:09 5 on the witness stand.

03:58:12 6 All right. Counsel, you may proceed with your
03:58:25 7 direct examination.

03:58:25 8 MR. SHEASBY: Thank you, Your Honor.

03:58:25 9 JOHN BRADY, PLAINTIFF'S WITNESS, SWORN

03:58:25 10 DIRECT EXAMINATION

03:58:26 11 BY MR. SHEASBY:

03:58:26 12 Q. Good afternoon, Mr. Brady. Can you introduce yourself
03:58:29 13 to the jury?

03:58:30 14 A. Yes. My name is John Brady.

03:58:32 15 Q. Why are you testifying today, Mr. Brady?

03:58:35 16 A. I was one of the technology leaders at USAA at the bank
03:58:39 17 when we initially implemented consumer remote deposit
03:58:45 18 capture. I was also the technology sponsor or the
03:58:49 19 technology lead for the project. And I -- I've been with
03:58:54 20 USAA for 15 years, and have been involved in pretty much
03:59:00 21 every technology project with the bank for the past 15
03:59:02 22 years.

03:59:03 23 MR. SHEASBY: Can you turn to PX-1186 and PX-1187,
03:59:09 24 Mr. Huynh, can you put those on the screen?

03:59:11 25 THE WITNESS: I forgot to bring my exhibits. Can

03:59:13 1 I grab my exhibits, please?

03:59:16 2 MR. SHEASBY: Your Honor, with your permission, I
03:59:18 3 will approach the witness with the exhibits.

03:59:19 4 THE COURT: You may approach the witness.

03:59:33 5 THE WITNESS: Thank you very much.

03:59:34 6 Q. (By Mr. Sheasby) We're looking -- Mr. Brady, do you
03:59:37 7 recognize PX-1186 and PX-1187?

03:59:39 8 A. Yes, these are the two patents involved in the case,
03:59:41 9 the '605 patent and the '681 patent.

03:59:43 10 Q. Can you point out USAA's name on both?

03:59:46 11 A. USAA is listed as the assignee, which means that the
03:59:53 12 U.S. Government awarded those patents to USAA.

03:59:55 13 Q. Can you tell us a bit about yourself, please?

03:59:58 14 A. Sure. I was -- I was born in Little Rock, Arkansas.
04:00:05 15 I -- I moved here around 15 years ago to go to work for
04:00:09 16 USAA. I now live in San Antonio, Texas. And I have a -- a
04:00:15 17 wonderful wife. We've been married for 33 years. And I
04:00:19 18 have a -- a son, who is now 28, and he is -- I'm very proud
04:00:25 19 of him.

04:00:26 20 Q. What is your position at USAA?

04:00:28 21 A. I am vice president of platform management at USAA.

04:00:32 22 Q. Is that an executive-level position?

04:00:34 23 A. Yes, it is an executive-level position. I'm also an
04:00:39 24 officer of the company.

04:00:40 25 Q. What is the size of the team that you lead at USAA?

04:00:43 1 A. Currently, my team is -- is just over a thousand
04:00:51 2 people. That includes both contractors as well as
04:00:53 3 employees.

04:00:53 4 Q. What is consumer remote deposit capture?

04:00:56 5 A. Consumer remote deposit capture is a sophisticated set
04:01:04 6 of technologies that USAA has developed that allows a --
04:01:07 7 a -- one of our members to deposit a check using -- using a
04:01:12 8 portable device that can capture a digital image and then
04:01:17 9 deposit that check into their -- into their checking
04:01:21 10 account.

04:01:22 11 Q. Can you show an example of USAA's current consumer
04:01:31 12 remote deposit capture system?

04:01:31 13 A. Yes, I can. I believe we have a video.

04:01:34 14 MR. SHEASBY: Mr. Huynh, can we have PDX-06,
04:01:39 15 please?

04:01:39 16 A. So here someone check -- clicks the deposit button.
04:01:39 17 They say they want to deposit a check. At that point, the
04:01:43 18 app instructs them to take a picture of the front of the
04:01:47 19 check, and then it will ask them to turn the check over,
04:01:51 20 capture a picture of the back of the check, notice it does
04:01:54 21 it automatically, and then at that point, we asked them to
04:02:05 22 enter the -- verify the -- the check by looking at the
04:02:09 23 thumbnail images, and then looking at the checking account,
04:02:11 24 and then enter the amount of the check.

04:02:15 25 And then at this point, we call all of the

04:02:19 1 validation that's necessary to -- to make sure that we have
04:02:23 2 a good image quality, that we meet all the fraud checks at
04:02:27 3 that point, and that we are -- we are ready to accept the
04:02:31 4 check, and then we give that confirmation back to the -- to
04:02:34 5 our members.

04:02:35 6 Q. (By Mr. Sheasby) What -- what technology teams had a
04:02:37 7 role in the creation of consumer remote deposit capture?

04:02:40 8 A. There were two technology teams. There was our Applied
04:02:45 9 Research team, as well as our bank IT technology team.

04:02:49 10 Q. What was the scale of the research budget at USAA in
04:02:54 11 the 2005 to 2009 time period?

04:02:56 12 A. 2005 to 2009?

04:02:58 13 Q. Yes.

04:02:59 14 A. We -- we actually do quite a bit of research and
04:03:06 15 development for a company our size. During that time
04:03:09 16 frame, I would say that we spent probably close to
04:03:13 17 \$1.5 billion in -- in technology and software development.

04:03:16 18 Q. What is the Applied Research division at USAA?

04:03:19 19 A. The -- the Applied Research division is actually a
04:03:25 20 subset of that overall research and development group, and
04:03:28 21 it is a group of research engineers that is specifically
04:03:32 22 focused on looking at more advanced technologies, more
04:03:37 23 forward thinking technologies, thinking longer term
04:03:40 24 about -- about some of those technologies and how we can --
04:03:43 25 how we can bring those -- those technologies to our

04:03:46 1 members.

04:03:48 2 MR. SHEASBY: Mr. Huynh, can we put back up
04:03:51 3 PX-1186 and PX-1187?

04:03:53 4 Q. (By Mr. Sheasby) Mr. Brady, can you tell us who are
04:03:56 5 the inventors on the patents-in-suit?

04:03:57 6 A. Yes. They're actually spread across the two patents
04:04:02 7 here. We have a total of 10 inventors, most of them are on
04:04:06 8 the '605 patent, the -- the one that is at the -- the top
04:04:13 9 left. Let's see, let me start, Chuck Oakes, let me list
04:04:19 10 the people from our Applied Research team first.

04:04:21 11 Chuck Oakes is from our Applied Research team,
04:04:24 12 Randy Morlen is from our Applied Research team, Mike Morris
04:04:28 13 is from our Applied Research team, along with Rey Medina.
04:04:33 14 And then a couple of names down is a gentleman named Bharat
04:04:38 15 Prasad. So those are the five members off of our -- our
04:04:41 16 Applied Research team.

04:04:42 17 We also have some members here from our bank IT
04:04:46 18 technology team. We have Greg Harpel, who is about halfway
04:04:51 19 down on the -- on the top left. We have Frank Major. We
04:04:58 20 also have Jeff Pollack. And then the other member of our
04:05:04 21 IT bank technology team is on the other patent, the '681
04:05:07 22 patent, he's down at the bottom, Troy Huth.

04:05:13 23 There's one other name on here that I want to
04:05:14 24 point out on here, as well, that's in the middle of the --
04:05:19 25 the one in the top -- top left corner, that is Gabe Gavia.

04:05:24 1 Gabe was a member of our business area that performed
04:05:28 2 check -- check processing.

04:05:29 3 Q. Between the inventors, how many years of engineering
04:05:31 4 experience did they have at the time of the inventions?

04:05:34 5 A. I would say this is a really talented group of these
04:05:41 6 10. This -- we have close to a hundred -- 150 patents that
04:05:48 7 these -- these named -- these 10 people are listed as the
04:05:52 8 inventors on. I think we're really lucky to have such a
04:05:55 9 great talented group at USAA.

04:05:57 10 Q. Are these the only engineers who have worked in the
04:06:07 11 mobile remote deposit program between 2004 and 2009?

04:06:08 12 A. No, they're not. I would say that we had quite a --
04:06:12 13 excuse me -- quite a large group at times. We had close to
04:06:15 14 40 people working on developing the technology.

04:06:17 15 Q. How many years of engineering experience did the
04:06:20 16 inventors have?

04:06:21 17 A. I believe that's 150, yes.

04:06:26 18 Q. And to clarify, how many United States patents have
04:06:29 19 been issued --

04:06:30 20 A. I'm sorry, I got that -- I -- I -- it's 239 patents
04:06:35 21 that they are listed as inventors on.

04:06:37 22 Q. What is your professional background?

04:06:38 23 A. I -- I have a Bachelor's degree and a Master's degree
04:06:43 24 in computer science. I went to University of Arkansas at
04:06:48 25 Little Rock. I -- I have been involved in bank technology

04:06:54 1 for 35 years building bank systems and -- and bank
04:06:59 2 software. And I -- like I said earlier, I have worked at
04:07:03 3 USAA for 15 years.

04:07:04 4 Q. You were here during the opening; is that correct, sir?

04:07:10 5 A. Yes, I was.

04:07:11 6 Q. Did you hear Wells Fargo state that they invented
04:07:14 7 mobile banking in 2007?

04:07:17 8 A. I heard that, yes.

04:07:18 9 Q. Do you know what feature Wells Fargo was offering in
04:07:20 10 2007?

04:07:21 11 A. I'm not sure I do.

04:07:24 12 Q. Do you know -- have you heard of an SMS text deposit
04:07:31 13 system?

04:07:31 14 A. Yes, I have.

04:07:32 15 Q. Do you know if Wells Fargo was operating -- offering
04:07:37 16 SMS text deposit in 2007?

04:07:40 17 A. I'm not sure.

04:07:42 18 Q. I'll move on.

04:07:42 19 A. Okay.

04:07:43 20 Q. During the development of consumer remote deposit
04:07:53 21 capture, what was your position at USAA?

04:07:53 22 A. I was the chief architect of the bank, and the -- what
04:07:56 23 that -- what that means is that the chief architect is
04:07:59 24 responsible for setting the overall technology strategy of
04:08:04 25 the bank and then working -- in addition, I worked with a

04:08:08 1 lot of projects, almost every project, to ensure that those
04:08:12 2 projects were meeting and following the technology strategy
04:08:17 3 of the bank. I -- I -- I was also one of the -- the -- the
04:08:22 4 technology leaders that helped influence our -- our -- our
04:08:28 5 business -- our business team to help -- to move forward
04:08:32 6 with -- with consumer remote deposit capture.

04:08:38 7 Q. Mr. Brady, have you ever testified in court before?

04:08:46 8 A. No, I haven't. I'm a little nervous. Sorry.

04:08:48 9 Q. I'd like you to describe the history of USAA as you
04:08:53 10 describe it to outsiders when you talk about your job.

04:08:56 11 A. Sure. So USAA was founded in 1922 by a group of 25
04:09:03 12 Army officers. They -- they met there in downtown
04:09:08 13 San Antonio to initially form the company. They -- they
04:09:13 14 decide -- at -- with -- with the military, they often move
04:09:17 15 around a lot. And as a result of moving around a lot,
04:09:22 16 they -- they often have trouble getting insurance.

04:09:24 17 So this group of 25 Army officers decided to come
04:09:27 18 together and -- and -- and insure themselves. Even today,
04:09:33 19 USAA is -- is a member -- member-owned organization where
04:09:39 20 the members insure themselves.

04:09:41 21 We -- we are open to the -- to the -- to active
04:09:44 22 military, retired military, as well as their families. We
04:09:47 23 also encourage employees to become members.

04:09:51 24 Q. Who owns USAA?

04:09:52 25 A. As I said, USAA is member-owned. So it's the -- we

04:09:59 1 don't have shareholders. We are not a public company. And
04:10:03 2 so we actually come from -- the members own it, and the
04:10:08 3 members insure themselves.

04:10:10 4 Q. What are the consequences, in your mind, of being
04:10:13 5 member-owned?

04:10:14 6 A. The -- there's a couple of consequences. First, I
04:10:22 7 believe since we don't have to answer to Wall Street and we
04:10:25 8 don't have to answer to quarter-by-quarter earnings, it
04:10:29 9 allows us to be a little more strategic in terms of the
04:10:33 10 thought process and -- and projects that we work on.

04:10:35 11 I believe the consumer remote deposit capture was
04:10:37 12 a real good example of that where we -- we were able to be
04:10:40 13 more strategic.

04:10:40 14 The other thing that it enables is for -- we do
04:10:45 15 things specifically to benefit our members. And so since
04:10:48 16 our members are owners, we do things to benefit the
04:10:53 17 members.

04:10:53 18 So we -- a good example of that is with ATM fees.
04:10:59 19 If one of our members goes to another bank's ATM and -- and
04:11:04 20 withdraws money -- let's say they go to a Wells Fargo ATM
04:11:07 21 and withdraw money, they could be charged up to \$3.50 for
04:11:12 22 the use of that ATM. We -- we reimburse our members that
04:11:16 23 full fee of \$3.50.

04:11:20 24 Q. What is the source of the money that is used to run
04:11:22 25 USAA, for example, to invest in new technology?

04:11:26 1 A. It all comes from -- from the members themselves,
04:11:31 2 whether it's used for -- whether it's used for claims, for
04:11:34 3 loans to members to pay out claims, loans to members, or
04:11:38 4 for the research and development.

04:11:40 5 Q. Do you have a financial interest in the outcome of this
04:11:43 6 lawsuit, sir?

04:11:44 7 A. Indirectly, I do. I am a member. I've been a member
04:11:49 8 for 33 years now. And every year, USAA takes a significant
04:11:54 9 portion of their -- of their profits and -- and we return
04:11:59 10 that -- that money to our members in terms of benefits
04:12:04 11 and -- and dividends.

04:12:06 12 And, for example, in 2018, we returned
04:12:11 13 approximately \$1.8 billion to our membership.

04:12:15 14 Q. How many members does USAA have?

04:12:18 15 A. We have 12.4 million members.

04:12:22 16 Q. How many employees does USAA have and where are they
04:12:25 17 located?

04:12:25 18 A. We -- we have 32,000 employees. Most of them are
04:12:31 19 located there at our headquarters in San Antonio. We also
04:12:35 20 have -- we also have locations near -- near some military
04:12:42 21 bases -- for example, in Tampa. We have -- we have
04:12:45 22 locations in Colorado Springs, Virginia, as well as some
04:12:51 23 overseas locations, such as Germany.

04:12:53 24 Q. You said that USAA was founded by Army officers as an
04:12:56 25 insurance mutual. Did USAA decide to create a bank at some

04:13:01 1 point?

04:13:01 2 A. Yes -- yes, we did. We decided to create a -- create
04:13:05 3 the bank in 1983. And so we were hearing a lot from our
04:13:11 4 members at the time, that they were looking for a low cost
04:13:14 5 banking alternative. And so at that point, we decided to
04:13:18 6 open up a bank.

04:13:20 7 Here we are now 35 years later, and we are now one
04:13:24 8 of the -- the larger banks in the U.S. We -- we have been
04:13:28 9 growing pretty consistently at about 8 percent year over
04:13:31 10 year, which I believe is the -- twice -- around twice the
04:13:36 11 industry average.

04:13:37 12 Since I joined the company, we have tripled the
04:13:39 13 size of the bank.

04:13:40 14 Q. In your role as chief architect of the bank, did you
04:13:45 15 come to understand the history of consumer remote deposit
04:13:48 16 capture at USAA?

04:13:48 17 A. Yes. I -- I have been involved with consumer remote --
04:13:55 18 remote deposit capture pretty much since the beginning.
04:14:01 19 Even when I -- even when I -- yeah, pretty much since the
04:14:04 20 beginning.

04:14:05 21 Q. Can you describe the inspiration for consumer remote
04:14:09 22 deposit capture at USAA?

04:14:09 23 A. So we -- you know, our -- our members are -- are active
04:14:20 24 military, retired military, and -- and their families. We
04:14:23 25 have -- we actually have members all over the world. We

04:14:26 1 have since we launched USAA as a bank in 1983 because we
04:14:30 2 were already a -- an insurance company. So we -- we've
04:14:36 3 had -- we have members all over the world. So it -- it
04:14:38 4 never has really made a lot of sense to us to build out a
04:14:43 5 branch network because we have members pretty much
04:14:46 6 everywhere.

04:14:46 7 So in -- instead, you know, we -- we've served --
04:14:52 8 we served our members through digital channels.

04:14:56 9 Q. Why was it important to USAA to have rapid digital
04:15:02 10 deposit with consumer devices?

04:15:04 11 A. So our -- our military members get paid through direct
04:15:11 12 deposit, for example, so the money is directly deposited
04:15:14 13 into their checking account on -- on payroll day.

04:15:17 14 We -- but even with that, we have a lot of members
04:15:22 15 that are living paycheck to paycheck. A lot of them are
04:15:25 16 enlisted or E-1 level. And so they are definitely living
04:15:30 17 paycheck to paycheck. And so we -- we -- they -- they rely
04:15:37 18 on checks from other sources, such as, you know, spouse's
04:15:42 19 income, maybe second jobs. They rely on -- on checks from
04:15:48 20 parents or other family members, grandparents.

04:15:52 21 And they need -- since they are living paycheck to
04:15:55 22 paycheck, they need access to those funds quickly. And so
04:15:59 23 our real inspiration is how -- you know, how do we -- how
04:16:03 24 do we deposit those checks quickly without branches?

04:16:11 25 Q. Did other banks offer ways to deposit checks other than

04:16:16 1 ATMs or tellers before your work?

04:16:18 2 A. Before we did our consumer RDC project, other banks did
04:16:26 3 offer services to large businesses that allowed them to
04:16:29 4 deposit checks remotely, primarily using specialized
04:16:33 5 scanners.

04:16:33 6 Q. Can you show a demonstrative of the specialized
04:16:38 7 scanners that were used before USAA's work?

04:16:39 8 A. Yes, we have one here. This -- this is actually one of
04:16:43 9 the -- one of the types of specialized scanners that would
04:16:46 10 be used by -- by, for example, a business. And it has
04:16:51 11 actually a -- a special slot here where you feed the check
04:16:57 12 in. It's got some rollers back here that -- that's
04:17:00 13 motorized that will -- that will load the check
04:17:02 14 automatically into a reader.

04:17:04 15 Within this environment, it's in a controlled
04:17:07 16 environment where we capture -- where they capture an image
04:17:09 17 of the check. And it -- it also has a -- it makes sure
04:17:15 18 it's perfectly aligned when it goes in there because it --
04:17:18 19 it has the alignment to perfectly calibrate where the check
04:17:21 20 is.

04:17:24 21 Also, these -- these devices have a magnetic
04:17:27 22 reader inside of them that will read the magnetic ink off
04:17:30 23 the check so that it can extract the -- the data off the
04:17:34 24 check, things like the account number, routing number,
04:17:37 25 those kind of things.

04:17:38 1 And so the other -- the other thing that these
04:17:40 2 will do is they will physically alter the check either by
04:17:44 3 doing some sort of indelible ink. I've seen -- I've seen
04:17:44 4 these in the past, too, that will punch holes in the bottom
04:17:49 5 of the check to make sure that it cannot be deposited
04:17:52 6 again.

04:17:52 7 These -- these do -- I mean, these - these do it
04:18:02 8 really well. They scan the checks really well, but they
04:18:02 9 only do one thing. And -- and so we -- it never has made
04:18:05 10 sense to ask our members to -- to purchase one of these
04:18:08 11 because, first of all, they are rather expensive, and they
04:18:12 12 only do one thing.

04:18:16 13 Q. Other than specialized scanners, were there other
04:18:19 14 options that existed before USAA's work?

04:18:23 15 A. We -- we knew about more industrial strength scanners.
04:18:31 16 In fact, there were -- you know, we have some -- we had
04:18:35 17 industrial-strength-type scanners even in our offices
04:18:39 18 where, you know, they -- they will -- they will read --
04:18:42 19 they will read multiple types of documents so they can be
04:18:44 20 used for multiple things, but they -- and then you can
04:18:48 21 adapt them to specific sizes of documents and adapt them to
04:18:53 22 a check size.

04:18:54 23 They have really good quality. They -- they --
04:18:59 24 you know, they will -- they will align a document as it's
04:19:03 25 being pulled in. They will -- they will crop the document

04:19:07 1 for you.

04:19:08 2 So they get a really good -- really good image.
04:19:12 3 But they are very expensive. I would say hundreds to maybe
04:19:17 4 thousand of dollars. And -- and -- and they're not
04:19:23 5 really -- I mean, they're -- they're very heavy, too. The
04:19:26 6 other thing is they weigh several hundred pounds. And so
04:19:30 7 they're not really -- they're not really movable. They're
04:19:34 8 not portable. You know, they're not -- they're not mobile.
04:19:37 9 And so those didn't really make sense to us either.

04:19:41 10 So what -- what we were looking for instead was,
04:19:52 11 you know, a -- devices that, first of all, did multiple
04:19:52 12 things so that our members, you know, may already have
04:19:55 13 something like that, like one of these devices. It --
04:19:58 14 it -- and -- or they could use it for other things, as
04:20:03 15 well.

04:20:03 16 And then, you know, the other criteria that we
04:20:05 17 were looking for was something that was mobile or portable,
04:20:08 18 so that if they -- if they had, for example, a -- a
04:20:10 19 permanent change of station and were moved, it's -- it's
04:20:13 20 likely something they would move with them.

04:20:16 21 MR. SHEASBY: Mr. Huynh, can you pull up PDX-11.1?

04:20:24 22 THE TECHNICIAN: I couldn't hear you.

04:20:25 23 MR. SHEASBY: PDX-11.1, Mr. Huynh.

04:20:39 24 A. Yeah, this -- this is an example of one of those more
04:20:42 25 industrial-type scanners you can see. And it's -- this is

04:20:46 1 the Fujitsu M4 model. And you can see it's -- it's even
04:20:50 2 sitting on a crate. So these are very heavy and very
04:20:53 3 expensive.

04:20:53 4 Q. (By Mr. Sheasby) What did USAA focus on for its
04:20:55 5 program?

04:20:55 6 A. So -- so we focused on a -- on -- on getting a portable
04:21:02 7 device that could capture an image, and we wanted to be
04:21:05 8 able to use any -- any consumer device that had a -- a
04:21:11 9 general purpose computer, as well as could capture a
04:21:15 10 digital image, and then upload that -- that to -- to our
04:21:16 11 bank.

04:21:16 12 Q. What does that mean in practical terms, what types of
04:21:20 13 devices?

04:21:20 14 A. In practical terms, you know, it meant -- it -- it
04:21:25 15 meant -- it meant really any type of device that could --
04:21:28 16 that could capture an image of a check. Practically, I
04:21:32 17 would say our members were using -- initially were using
04:21:37 18 digital cameras. They were using home scanners. They were
04:21:41 19 also using -- they were also using pretty much any device
04:21:45 20 that could -- that could capture -- capture an image.

04:21:48 21 We -- the first thing that we used was actually
04:21:51 22 the -- the -- a flatbed scanner which was the Lexmark. We
04:21:56 23 used the -- the Lexmark initially. So --

04:21:59 24 Q. Where did you get the Lexmark from?

04:22:01 25 A. We -- we actually bought the -- the Lexmark. We sent

04:22:05 1 our team down to Best Buy to pick up the Lexmark. It was
04:22:11 2 one of those all in one scanners that was a -- it was a
04:22:13 3 printer, a copier, a fax machine, as well as a scanner,
04:22:19 4 pretty much all in one. It was a type of device that a lot
04:22:23 5 of consumers either already had in their home or -- or
04:22:27 6 would likely purchase. So it was just an everyday
04:22:32 7 consumer-based scanner.

04:22:33 8 Q. What was the long-term goal of the consumer remote
04:22:36 9 deposit capture program?

04:22:37 10 A. Our long-term goal for the program was we -- we wanted
04:22:43 11 to create an infrastructure that would handle the images,
04:22:47 12 and then be able to adapt to new -- new devices over time.
04:22:50 13 We knew that devices were changing very quickly, and so we
04:22:53 14 wanted to -- you know, we wanted to have all the -- all the
04:22:57 15 pieces in place, and then -- then we knew -- we knew things
04:23:02 16 were changing, so we wanted to -- our long-term was to
04:23:05 17 adapt to new technologies.

04:23:06 18 Q. When was a working prototype of consumer remote deposit
04:23:10 19 capture created?

04:23:10 20 A. I -- I know it was created in 2005 because I saw a
04:23:16 21 demonstration of it down in our lab.

04:23:18 22 Q. And what was the consumer device used with that -- was
04:23:18 23 that --

04:23:22 24 A. That was the Lexmark, yes.

04:23:23 25 Q. Did USAA face unique challenges when developing

04:23:28 1 consumer remote deposit capture?

04:23:29 2 A. We had -- we had quite a number of challenges. I mean,
04:23:32 3 we -- we didn't have -- you know, we didn't have physical
04:23:36 4 access to the check. We had to worry about, you know, with
04:23:39 5 taking an image even, taking an image, you know, a -- the
04:23:44 6 check could be anywhere in the image, and so we had to deal
04:23:47 7 with, first of all, coming up with tools to help find where
04:23:52 8 the image was within the -- where the check was within the
04:23:56 9 image.

04:23:56 10 We also had to come up with tools to help us, you
04:24:02 11 know, deal with the check being at an angle, so, you know,
04:24:06 12 de-skewing the check. Also, with -- with certain devices,
04:24:09 13 you may have, you know, a different angle that you're
04:24:12 14 holding the device at in order to capture the picture which
04:24:16 15 gives you a distorted view of the check and, you know, kind
04:24:19 16 of a prospective view, and so we had to deal with software
04:24:24 17 to handle that, as well.

04:24:28 18 Also, we didn't have physical access to the check,
04:24:31 19 so all the data that we gather off the check we have to get
04:24:37 20 off the image. We can't rely on a magnetic ink reader like
04:24:42 21 these things have to read the data and the information off
04:24:45 22 the check. So we had to rely on the image. So getting a
04:24:48 23 really good quality image was extremely important to us.

04:24:51 24 At that time, well, we -- you know, and getting a
04:24:56 25 good quality image off -- getting a good quality check

04:25:00 1 image off of the overall check is a challenge, too, because
04:25:04 2 it may be on a -- it may be on a dark desktop. It may be
04:25:09 3 on a light counter top, and so there's challenges involved
04:25:12 4 with that.

04:25:12 5 At that time, too, even now a lot of people like
04:25:19 6 to have backgrounds printed on their check. Some of our
04:25:25 7 military members like to have military scenes printed on
04:25:27 8 the back of their checks.

04:25:28 9 At that time, those Care Bear checks were really
04:25:31 10 popular, and I specifically remember having to deal with
04:25:35 11 what are the issues that we've got to deal with reading the
04:25:38 12 data off of a Care Bear. I mean, those turned out to be
04:25:41 13 kind of a nightmare.

04:25:41 14 Q. Do you remember whose wife had Care Bear checks back
04:25:45 15 then?

04:25:46 16 A. I believe it was Chuck -- Mr. Oakes, yeah.

04:25:49 17 Q. Why was -- how did USAA solve these problems?

04:25:56 18 A. We solved these problems by creating a sophisticated
04:26:00 19 set of software that allowed -- that allowed our members to
04:26:03 20 use consumer devices to capture the images and then have
04:26:08 21 them deposited into their checking account.

04:26:10 22 Q. Why was USAA in a position to build this system?

04:26:12 23 A. I would say we were in a position to build this system
04:26:17 24 because we invested in our Applied Research team. I was
04:26:20 25 actually on the committee that helped prioritize the

04:26:24 1 projects that we worked on for that committee -- for that
04:26:28 2 team.

04:26:28 3 Q. When did you make the first system fully available to
04:26:30 4 members?

04:26:31 5 A. We -- we made the first system fully available June of
04:26:38 6 2006, and then we continued to roll that out 2006 into
04:26:44 7 2007.

04:26:44 8 Q. What did the system work with by 2007?

04:26:47 9 A. It worked with flatbed scanners, digital cameras, and
04:26:52 10 webcams, as well as -- by 2007?

04:26:55 11 Q. Yes, yes, Mr. --

04:26:57 12 A. By 2007, we also enabled any device that could take an
04:27:03 13 image of a check and then upload that check to our website.

04:27:07 14 MR. SHEASBY: Mr. Huynh, can we pull up PX-0039
04:27:13 15 and can we pull up the top email?

04:27:17 16 Q. (By Mr. Sheasby) Mr. Brady, do you recognize this
04:27:18 17 email?

04:27:19 18 A. Yes, I do. This is a -- this is an email from Chuck
04:27:24 19 Oakes from June of 2006. This was about three weeks before
04:27:28 20 we launched.

04:27:30 21 Q. Who is Chuck Oakes?

04:27:32 22 A. Mr. Oakes, he was the manager for our Applied Research
04:27:39 23 lab. He -- Mr. Oakes is retired now. He managed that team
04:27:43 24 for quite a number of years. He retired a couple years
04:27:48 25 ago.

04:27:49 1 In -- in Mr. Oakes's time down in the lab, in the
04:27:53 2 research lab, he -- he was named inventor for over a
04:27:58 3 hundred different patents.

04:28:00 4 Q. What is the context of this email?

04:28:02 5 A. This -- this email, Mr. Oakes is discussing the vision
04:28:07 6 that we had. If you look at the second line down, the
04:28:10 7 first sentence, starting with "this effort," he calls out
04:28:16 8 this effort can and will revolutionize the banking
04:28:20 9 industry, the virtual -- the virtual bank branch, that's
04:28:23 10 what we were trying to solve.

04:28:25 11 We didn't have -- you know, we didn't have
04:28:25 12 physical branches, and so we were trying to figure out how
04:28:28 13 do we put branches in our members' hands? How do we create
04:28:33 14 a virtual branch?

04:28:34 15 And let me go down to the next line there, I
04:28:37 16 strongly believe -- Chuck goes on here: I strongly believe
04:28:40 17 that the effort of producing this innovation is an example
04:28:42 18 of what USAA is made of, vision, strength, determination,
04:28:46 19 member focused, and commitment. We've been told that this
04:28:49 20 product will not work, that it can't be done, you can't do
04:28:55 21 that, no one else is doing this, so we can't either. I
04:28:59 22 believe this company can do anything. I think this is a
04:29:02 23 great email.

04:29:03 24 THE COURT: Mr. Brady, if I can ask you not to
04:29:05 25 refer to Mr. Oakes simply as Chuck or using first names

04:29:09 1 only.

04:29:09 2 THE WITNESS: Thank you. Yes, I will.

04:29:10 3 THE COURT: All right. Let's continue, counsel.

04:29:12 4 MR. SHEASBY: Mr. Huynh, can you pull up PX-0036?

04:29:22 5 And if you could turn to Page 3 of that document.

04:29:26 6 Mr. Huynh, if you can pull up the bottom email

04:29:28 7 from Chuck Oakes dated October 25th, 2006.

04:29:32 8 Q. (By Mr. Sheasby) Mr. Brady, do you recognize this

04:29:34 9 email?

04:29:35 10 A. Yes, I do. This is another email from Mr. Oakes,

04:29:38 11 October 25th, 2006. This was later. This was after --

04:29:41 12 after we had launched the system.

04:29:48 13 Q. What is the relevance of this email to you?

04:29:48 14 A. So what -- what Mr. Oakes is calling out here is that

04:29:50 15 this is the first time one of our members had used a

04:29:54 16 digital camera to capture an image of a check, and we

04:29:58 17 actually -- we actually knew that it would work.

04:30:02 18 If you look down at the kind of second paragraph.

04:30:04 19 We knew it would work, but we -- because it was in the

04:30:10 20 original design that we had from a year -- from about a

04:30:13 21 year previous because we had talked about using digital

04:30:17 22 cameras even a year previous.

04:30:19 23 But then the second -- I guess the third line down

04:30:23 24 in the second paragraph, he's also calling out the use of a

04:30:26 25 camera to capture the check image and process it through

04:30:30 1 the Deposit@Home application can be a huge competitive
04:30:34 2 advantage.

04:30:35 3 Q. What is the relationship between the date of this email
04:30:37 4 and the date of the filing of the patents?

04:30:39 5 A. October 26th, that was about a week before we filed our
04:30:44 6 patents.

04:30:45 7 Q. Did mobile phone digital cameras exist in 2006 that
04:30:51 8 could be used with the system?

04:30:52 9 A. We -- there were several mobile phones that were on the
04:30:56 10 market that had a high enough pixel image resolution to be
04:31:01 11 used. We -- we knew at the time those -- those phones were
04:31:06 12 more expensive and most of our members wouldn't have those,
04:31:09 13 though.

04:31:09 14 Q. What was the first full end-to-end successful test of a
04:31:13 15 mobile phone image using the system?

04:31:14 16 A. We -- we had the -- we had the infrastructure to handle
04:31:20 17 the images available in 2006. We first started up a
04:31:25 18 project to begin working with -- with mobile phones in
04:31:32 19 2007, early 2007, and by -- by really the -- early 2007,
04:31:38 20 we -- we were successfully running end-to-end using mobile
04:31:42 21 phones.

04:31:42 22 Q. You said the word project. What does project mean at
04:31:47 23 Wells -- at USAA?

04:31:48 24 A. For -- for me, a project is when we officially start up
04:31:50 25 a -- start up a project either in our Applied Research lab

04:31:54 1 or through -- through development. We do a lot of
04:31:57 2 experimentation before that, but that's the -- that's what
04:32:00 3 I'm considering to be a project.

04:32:02 4 MR. SHEASBY: Can you -- Mr. Huynh, can you turn
04:32:04 5 to Pages 1 to 2 of PX-36 and pull up the email from Troy
04:32:10 6 Huth?

04:32:11 7 Q. (By Mr. Sheasby) I'm showing an email from Troy Huth.
04:32:15 8 First, who is Troy Huth?

04:32:17 9 A. Troy Huth was one of the inventors. He was in our bank
04:32:21 10 technology team.

04:32:22 11 Q. And the subject is use of a camera for Deposit@Home
04:32:25 12 check image --

04:32:26 13 A. Right, this is a reply. It's part of the same email
04:32:28 14 chain that we looked at just previously.

04:32:31 15 Q. In your mind, what is the relevance of this document?

04:32:34 16 A. So a couple of things, if you can go down to the third
04:32:37 17 paragraph, starting with Mike Morris, so this is still
04:32:41 18 talking about the use of a camera, and Mike -- Mike Morris
04:32:47 19 did check with the use -- Mike Morris did check and the use
04:32:50 20 of a camera to capture the image is included in our patent
04:32:55 21 application. So I wanted to point that out.

04:32:57 22 Also, Mr. Huth in this email is discussing the use
04:33:00 23 of camera phones up in the first paragraph. And while we
04:33:04 24 knew at the time that the camera phones would work, we also
04:33:09 25 knew that there were -- there would be challenges with the

04:33:14 1 pixel quality on some of those camera phones. And so we
04:33:19 2 knew it would work, but we -- we needed to work on
04:33:23 3 improving the experience in order to make the experience
04:33:25 4 flawless for our members.

04:33:27 5 Q. Okay. Who is Mike Morris?

04:33:28 6 A. Mike Morris was another one of the inventors. Mike is
04:33:33 7 extremely talented. He's a developer.

04:33:35 8 Q. Did USAA have a complete working consumer remote
04:33:39 9 deposit capture system that could accept images from
04:33:41 10 consumer digital cameras by the time of the patent filing?

04:33:44 11 A. Yes, we did.

04:33:46 12 MR. SHEASBY: Can you turn to PX-0044, please?

04:33:51 13 Q. (By Mr. Sheasby) Do you recognize PX-0044?

04:33:54 14 A. Yes, I do. This is a -- this is the -- looks like the
04:34:02 15 last page of a -- of a status report from our Applied
04:34:08 16 Research team. This is actually describing a project that
04:34:12 17 Rey Medina was working on. Rey was another one of our
04:34:16 18 inventors.

04:34:16 19 Q. How many patents does Rey Medina have?

04:34:19 20 A. I believe Rey has close to 90 patents that he's the
04:34:24 21 inventor on.

04:34:24 22 THE COURT: Mr. Brady, I'm going to ask you again
04:34:26 23 not to refer to individuals by first name.

04:34:29 24 THE WITNESS: I apologize, I'm sorry.

04:34:30 25 THE COURT: There's a reason for that. At some

04:34:32 1 point, what's said in this courtroom may be reviewed on
04:34:37 2 appeal and it will be a written transcription of what was
04:34:40 3 said. And if people are referred to by first name only,
04:34:43 4 we're going to end up with more than one person with the
04:34:46 5 same first name, and it's going to be unavoidably
04:34:49 6 confusing, so we try to not refer to any individuals by
04:34:52 7 first name only.

04:34:52 8 THE WITNESS: I apologize, sir.

04:34:54 9 THE COURT: Okay.

04:34:55 10 THE WITNESS: I'll be mindful.

04:34:56 11 THE COURT: Let's continue.

04:34:57 12 Q. (By Mr. Sheasby) What does this document show?

04:34:59 13 A. This shows that Mr. Medina was working on a project
04:35:05 14 called remote check deposit via cellular phone camera. It
04:35:10 15 shows -- it was from -- the date is April 9th of 2007. It
04:35:16 16 also shows that it's an L3 project, which stands for a
04:35:19 17 Level 3 research project, which was the highest more
04:35:23 18 advanced type of research that we were working on at the
04:35:25 19 time.

04:35:26 20 And then if you look at the second and third
04:35:31 21 bullet there, it shows that he had a solution, a prototype
04:35:34 22 solution. And then the last bullet shows that he was
04:35:36 23 working on knowledge transfer over to the execution team
04:35:40 24 who would then take this on to their -- bring it out to
04:35:44 25 members.

04:35:46 1 MR. SHEASBY: Can you turn to PX-0043, Mr. Huynh?

04:35:49 2 Q. (By Mr. Sheasby) And do you recognize this document?

04:35:55 3 A. Yes, this is a presentation from Bharat Prasad. Bharat
04:36:00 4 was another one -- Bharat Prasad was another one of the --
04:36:03 5 the inventors, and this is from 2007.

04:36:09 6 MR. SHEASBY: Can you turn to Page 12 of that
04:36:11 7 document, Mr. Huynh?

04:36:12 8 Q. (By Mr. Sheasby) Do you have an understanding as to
04:36:14 9 why the iPhone is listed as one of four cameras?

04:36:19 10 A. Well, the -- the iPhone -- the iPhone is a camera.
04:36:22 11 It's a -- it's a digital camera, a phone, a general purpose
04:36:27 12 computer, and, you know, a wireless communication device
04:36:32 13 pretty much all in one.

04:36:33 14 Q. Do you remember the dates on which USAA expanded to
04:36:36 15 different consumer devices?

04:36:38 16 A. We -- yes, we -- we announced the -- the iPhone in May
04:36:47 17 of 2009. We started rolling it out in June of 2009 to our
04:36:53 18 members, and continued to roll it out through -- through
04:36:56 19 August. And in January of the following year, 2010, we
04:37:02 20 also introduced the -- the Android app, and then also in --
04:37:10 21 let's see, in 2011, we introduced the iPad application to
04:37:15 22 allow you to take a -- a picture of a check with a -- with
04:37:19 23 an iPad.

04:37:21 24 Also, in 2011, we did the Windows Mobile phone,
04:37:24 25 and we did -- we also enabled our mobile website so

04:37:29 1 that any -- any device that had access to our mobile
04:37:33 2 website and could capture an image could upload a check.
04:37:36 3 And so that covered things like BlackBerries, for example.

04:37:40 4 Q. Did you continue to improve the image capture
04:37:44 5 software used with this system?

04:37:45 6 A. The image capture software?

04:37:47 7 Q. The image quality, yes.

04:37:48 8 A. The image quality software, yes, we continued to
04:37:52 9 improve it. We are even improving it today. We're always
04:37:56 10 making enhancements to it.

04:37:58 11 Q. Did you have team members assist you with mobile --
04:38:01 12 with consumer remote deposit capture?

04:38:01 13 A. Yes, we did. We expanded the team to include support
04:38:07 14 organizations, additional development organizations, as
04:38:10 15 well as we brought in additional executives. And then at
04:38:15 16 some point, I ended up turning over the technical
04:38:18 17 sponsorship to a gentleman named Michael Bueche.

04:38:22 18 Q. At some point did the name of the system change?

04:38:25 19 A. When -- yes. When we -- when we introduced the -- when
04:38:31 20 we introduced the iPhone -- the iPhone application, we
04:38:35 21 allowed our members to download the application from the
04:38:41 22 Apple App Store, rather than from our own USAA.com website.
04:38:46 23 So to reflect that new experience, we -- we changed the
04:38:52 24 name to Deposit@Mobile.

04:38:54 25 MR. SHEASBY: Let's turn to PX-0143, Mr. Huynh.

04:38:58 1 Q. (By Mr. Sheasby) Do you recognize this document,
04:39:00 2 Mr. Brady?

04:39:02 3 A. Yes, I do. This is a -- this is an industry trade
04:39:09 4 article that talks about -- this was -- this was a good
04:39:11 5 example of the type of press we were getting right after we
04:39:14 6 released the -- the iPhone application. And this is --
04:39:19 7 this is calling out the -- the application that we did. I
04:39:26 8 think this -- can you zoom into the second paragraph there,
04:39:31 9 as well?

04:39:31 10 Yes, so -- yeah, this is calling out that the
04:39:38 11 military bank and insurance provider USAA recently launched
04:39:43 12 mobile check deposit technology.

04:39:43 13 Q. Mr. Brady --

04:39:43 14 A. Yes.

04:39:44 15 Q. -- can I -- can I ask you to slow down for Madam Court
04:39:47 16 Reporter?

04:39:47 17 A. Yes, I can, sorry.

04:39:49 18 And so it -- it talks about users being able to
04:39:54 19 deposit checks from anywhere using an iPhone. Also, down
04:39:58 20 at the bottom -- bottom paragraph down there, it calls out
04:40:03 21 that right now, USAA represents the bleeding edge of mobile
04:40:07 22 banking technology, which means that we were ahead of
04:40:10 23 everybody -- ahead of everybody else here.

04:40:15 24 MR. SHEASBY: Can you turn to PX-57, please?

04:40:17 25 Mr. Huynh?

04:40:18 1 A. Can we go back to that for one -- one minute?

04:40:21 2 Q. (By Mr. Sheasby) Of course, Mr. Brady.

04:40:23 3 A. There was one thing I also wanted to point out on here.

04:40:23 4 MR. SHEASBY: Can we turn back to PX-143,

04:40:27 5 Mr. Huynh?

04:40:31 6 MR. HILL: Your Honor, I'll ask that question to

04:40:31 7 be asked to elicit a response, rather than the witness

04:40:31 8 volunteering information.

04:40:31 9 THE WITNESS: Okay. Sure.

04:40:36 10 MR. SHEASBY: Absolutely.

04:40:36 11 THE COURT: Well, we're here for the lawyers to
04:40:37 12 ask questions and the witnesses to give answers, but we're
04:40:42 13 back there, so ask a question you want to ask on this
04:40:44 14 slide. And then let's move forward, Mr. Sheasby.

04:40:47 15 Q. (By Mr. Sheasby) Mr. Brady, is there something else
04:40:50 16 you wanted to -- was there another relevant sentence on
04:40:54 17 PX-143?

04:40:54 18 A. I did want to point out that they -- they actually
04:40:57 19 called out the fact that we -- the bank -- the bank only
04:41:00 20 has one branch located in San Antonio.

04:41:04 21 Q. Turning now to PX-57, do you recognize this article,
04:41:10 22 Mr. Brady?

04:41:10 23 A. Yes, I do. This is -- the -- the last article was a --
04:41:19 24 was an industry trade journal. This is actually The New
04:41:25 25 York Times, so this is actually a -- you know, a public

04:41:27 1 newspaper. And so, again, this one is calling out -- and
04:41:29 2 this is from August -- yes, this is one is also calling out
04:41:32 3 and talking about when we -- when we launched the iPhone
04:41:35 4 application.

04:41:36 5 Q. Is this article about USAA's --

04:41:40 6 A. Yes, it is -- it is specifically about USAA's iPhone
04:41:43 7 application to deposit a check.

04:41:44 8 Q. If you turn to Page 2 of that document --

04:41:46 9 MR. SHEASBY: And, Mr. Huynh, can you pull up the
04:41:48 10 first two paragraphs?

04:41:50 11 Q. (By Mr. Sheasby) What is the article talking about
04:41:52 12 here?

04:41:53 13 A. So it -- the first line, USAA may seem like an unlikely
04:41:59 14 inventor [sic] in mobile banking. I -- again, I -- I think
04:42:03 15 they didn't know our -- our Applied Research team really
04:42:05 16 well. I -- I think we have a lot of innovation in our
04:42:08 17 Applied Research team.

04:42:09 18 It also points out later in that paragraph that
04:42:13 19 we -- you know, we're a smaller bank. We're just below the
04:42:16 20 top 20 banks. And then also in -- yeah, the first -- the
04:42:21 21 first -- right there, yes.

04:42:23 22 Also, at the second paragraph, but with just one
04:42:28 23 branch in San Antonio and customers deployed all over the
04:42:32 24 world, the company has been aggressively developing an
04:42:36 25 anytime, anywhere banking strategy, which is, again,

04:42:38 1 exactly what we were trying to do.

04:42:41 2 Q. The -- the article says: Three years ago, it
04:42:43 3 introduced the option of depositing a check from home using
04:42:46 4 a scanner. That laid the groundwork for the phone deposit
04:42:49 5 feature which USAA plans to offer on other phones this
04:42:53 6 year. Do you know what that is referring to?

04:42:55 7 A. That actually is -- is calling out our own long-term
04:42:58 8 strategy that we had to build an infrastructure that would
04:43:01 9 adapt to new technologies.

04:43:03 10 MR. SHEASBY: Let's pull that down, Mr. Huynh.

04:43:06 11 Let's put up PX-0195.

04:43:13 12 Q. (By Mr. Sheasby) Do you recognize PX-0195, Mr. Brady?

04:43:22 13 A. Yes, I do. This is -- this -- this is discussing the
04:43:29 14 patents that we have pending.

04:43:32 15 Q. Is this a page from USAA's public website?

04:43:34 16 A. Yes, this is from our public website. I believe this
04:43:37 17 went up in 2016.

04:43:41 18 MR. SHEASBY: And, Mr. Huynh, if you could
04:43:43 19 highlight the numbers on the bottom.

04:43:44 20 A. The '681 and the '605 patent.

04:43:47 21 Q. (By Mr. Sheasby) So the document says: USAA's
04:43:50 22 Deposit@Mobile and Deposit@Home include innovative features
04:43:53 23 that are protected by multiple patents issued by the United
04:43:56 24 States Patent and Trademark Office.

04:43:56 25 Is that correct, sir?

04:43:57 1 A. That's correct.

04:43:57 2 Q. And did USAA publicly identify the patents-in-suit in
04:44:01 3 this case as protecting its products?

04:44:07 4 A. Yes, we did. You can see here specifically we called
04:44:10 5 out the '681 and the '605 patent. It says other patents
04:44:15 6 pending, as well.

04:44:16 7 Q. Do you have personal knowledge about how the
04:44:17 8 Deposit@Mobile system at USAA works?

04:44:19 9 A. Yes, I'm familiar with it.

04:44:21 10 Q. Does it include a downloaded application that is run on
04:44:24 11 a customer's mobile device?

04:44:25 12 A. Yes, it includes a downloaded application.

04:44:28 13 Q. Does the system employ the use of mobile or portable
04:44:31 14 devices with digital cameras in general purpose computers?

04:44:34 15 MR. HILL: Objection, Your Honor. May we
04:44:35 16 approach?

04:44:36 17 THE COURT: Approach the bench, counsel.

04:44:38 18 (Bench conference.)

04:44:50 19 THE COURT: What's the objection, Mr. Hill?

04:44:52 20 MR. HILL: Your Honor, this is improper opinion
04:44:54 21 testimony from a non-expert. He is reading the claim
04:44:57 22 limitations and asking this witness whether or not the USAA
04:45:03 23 system meets the claim limitations.

04:45:05 24 He's doing a claim analysis. And this witness
04:45:08 25 can't do that as a fact witness. That necessarily requires

04:45:12 1 opinion testimony and necessarily requires an understanding
04:45:14 2 of the claim construction, application of claim
04:45:18 3 construction terms and definitions to answer these
04:45:20 4 questions. It's expert opinion testimony and improper.

04:45:23 5 THE COURT: Response?

04:45:24 6 MR. SHEASBY: Your Honor, he's the corporate
04:45:26 7 representative. A corporate representative was offered on
04:45:27 8 the exact issue of whether USAA's patents practice the
04:45:31 9 patent-in-suit. He gave full technical testimony in the
04:45:34 10 subject. He had a full opportunity to examine someone on
04:45:37 11 this subject.

04:45:38 12 Mr. Brady has personal knowledge of how this
04:45:40 13 system operates. He's not comparing claim construction
04:45:43 14 to -- he's not putting up claim language. He's merely
04:45:47 15 describing the factual information.

04:45:48 16 The only claim construction term that was in
04:45:51 17 dispute was mobile device and portable device, which they
04:45:54 18 concede are present. There's no claim construction that is
04:45:56 19 being done.

04:45:57 20 We are right -- we are entitled to have a
04:45:59 21 corporate representative do this.

04:46:01 22 THE COURT: Well, he may be asked a question based
04:46:05 23 on what the claim language calls for, but the question as
04:46:08 24 presented is a fact question that he's answered yes or no,
04:46:14 25 this is or isn't present in this product. And he has

04:46:18 1 personal knowledge of what -- it appears to me to be a fact
04:46:19 2 question and one that does not call for an opinion. He is
04:46:23 3 a fact witness. He's not an expert witness.

04:46:24 4 And I will hold him to avoiding opinions or other
04:46:28 5 type of expert testimony. But I'm going to overrule this
04:46:30 6 objection.

04:46:31 7 MR. HILL: Your Honor, may I -- may I ask,
04:46:32 8 Your Honor, if I can get a running objection if he's going
04:46:34 9 to go through the entire list of these claim elements
04:46:38 10 because I don't want to have to object to each one?

04:46:40 11 THE COURT: The claim elements may be the basis
04:46:42 12 for Mr. Sheasby's questions, but as to the witness and the
04:46:45 13 jury, he's just simply asked, does this have that, which is
04:46:48 14 a simple fact question.

04:46:49 15 Now, the claim language may be the reason why
04:46:52 16 Mr. Sheasby asked that question, but there's nothing
04:46:55 17 improper about that.

04:46:55 18 MR. HILL: Your Honor, the reason it's misleading
04:46:57 19 to the jury is because -- and that's another basis for my
04:47:00 20 objection is because he necessarily -- to answer that
04:47:03 21 question and it have relevance, it has to be in the context
04:47:06 22 of the claim language, which means he has to apply the
04:47:08 23 Court's claim constructions. Otherwise, the fact that
04:47:11 24 these things he reads, this witness says are present in
04:47:15 25 their product, the answer is not relevant.

04:47:18 1 THE COURT: Every fact question asked of a fact
04:47:22 2 witness doesn't have to relate to the claim language to
04:47:22 3 have relevance. I don't necessarily agree with that broad
04:47:24 4 of a statement.

04:47:24 5 MR. SHEASBY: I'm fine with you having a running
04:47:26 6 objection, Mr. Hill.

04:47:29 7 THE COURT: Well, that's not your call,
04:47:30 8 Mr. Sheasby.

04:47:30 9 MR. SHEASBY: I apologize. That was
04:47:33 10 disrespectful, Your Honor. I was just trying to --

04:47:36 11 THE COURT: You're free to make the same objection
04:47:38 12 as you think is necessary, Mr. Hill, but I'm going to
04:47:41 13 overrule this objection.

04:47:42 14 MR. SHEASBY: I apologize for stepping on --

04:47:44 15 THE COURT: Let's proceed.

04:47:48 16 (Bench conference concluded.)

04:47:49 17 THE COURT: All right. Counsel, let's proceed.

04:47:50 18 Q. (By Mr. Sheasby) As part of the process, does the
04:47:55 19 mobile application provide instructions to users?

04:47:58 20 A. Yes, we provide instructions on how to best capture
04:48:03 21 the -- the best image of the check.

04:48:05 22 Q. Does it instruct -- does the mobile application that
04:48:08 23 USAA produces instruct the customer to take the photos of
04:48:12 24 the front and back of the check?

04:48:13 25 A. Yes, we instruct them to take photos of the front and

04:48:16 1 back.

04:48:16 2 Q. Does the USAA system display a graphical illustration
04:48:20 3 to assist of the customer in having a digital camera take
04:48:23 4 the photos of the check?

04:48:24 5 A. Yes. Yes, we do.

04:48:25 6 Q. Do -- does -- do the illustrations provided to the
04:48:28 7 customer assist the customer in placing the digital image a
04:48:33 8 proper distance away from the check for taking a photo, and
04:48:36 9 how do they do that?

04:48:37 10 A. Yes, they -- they provide assistance. They have a -- a
04:48:41 11 guide on there and they will review --

04:48:42 12 MR. HILL: Objection, Your Honor. He got his
04:48:45 13 answer started before I got my objection. Improper opinion
04:48:50 14 testimony.

04:48:50 15 THE COURT: Overruled.

04:48:56 16 A. So they will -- the application will -- will give
04:48:57 17 guidance on are you too close in, are you too far out, do
04:49:02 18 you need to move up, do you need to move -- move back?
04:49:05 19 We -- we -- it will give the instructions on the screen of
04:49:08 20 the app.

04:49:09 21 We also have a technology that we released for --
04:49:15 22 for the visually impaired which gives them verbal
04:49:19 23 instructions on how to position the check.

04:49:20 24 Q. (By Mr. Sheasby) Does the application provide
04:49:22 25 assistance to ensure a proper image?

04:49:24 1 A. Yes, it does.

04:49:25 2 Q. Does the application present the captured images to the
04:49:28 3 user?

04:49:28 4 A. Yes, it provides the images back to the user as
04:49:33 5 thumbnails for their verification.

04:49:36 6 Q. Is there a transmission over a wireless network after
04:49:39 7 presenting and after the system checks for errors?

04:49:43 8 MR. HILL: Objection, Your Honor. Calls for
04:49:46 9 improper opinion testimony.

04:49:48 10 THE COURT: Overruled.

04:49:49 11 A. Yes, it does.

04:49:50 12 Q. (By Mr. Sheasby) Are the captured images sent to USAA
04:49:55 13 over a wireless network?

04:49:56 14 A. They are -- yes, they are sent to USAA over a wireless
04:50:01 15 network, either WiFi or cellular.

04:50:04 16 Q. Does the submission of the image only occur after the
04:50:04 17 user has been authenticated and presented with the approved
04:50:10 18 images?

04:50:10 19 A. Yes, it occurs after the authentication, after we walk
04:50:14 20 our members through the process of capturing the check, and
04:50:18 21 then -- and then it is submitted.

04:50:22 22 Q. Do USAA computers update the account balance based on
04:50:27 23 the check image provided?

04:50:30 24 A. Yes, our -- our computers do update the account
04:50:33 25 balance.

04:50:34 1 Q. Does USAA perform an OCR of the MICR line and a
04:50:38 2 separate OCR of the check amount?

04:50:40 3 A. Yes. Yes, we do. We actually -- we've experimented
04:50:45 4 with that a little bit. We -- we initially offered two
04:50:49 5 different OCRs of the -- of the check amount. And we --
04:50:57 6 we've always offered OCR of the -- the MICR line, as well.
04:51:01 7 That's the -- the letters and the numbers in the bottom
04:51:05 8 left-hand corner.

04:51:07 9 For a period of time we decided to only do one OCR
04:51:11 10 for the amount, but after -- after we looked at it, you
04:51:18 11 know, I -- I actually learned that -- that that check
04:51:21 12 was -- the second OCR check on the amount was even more
04:51:25 13 important, and so we -- we have now added that back in.

04:51:30 14 Q. Is there a confirmation step that is performed?

04:51:35 15 A. Is there a confirmation step that is performed?

04:51:39 16 Q. By the system, yes.

04:51:40 17 A. Yes, the -- the mobile app will -- will call the --
04:51:45 18 will call a component for -- to do the OCR and confirm that
04:51:49 19 it's been done.

04:51:50 20 Q. Does the system check for errors?

04:51:52 21 A. Yes, it checks for -- checks for errors, checks for
04:51:57 22 image quality errors, checks for fraud errors, checks for
04:52:01 23 quite a number of errors.

04:52:02 24 Q. Is there an initiation of deposit after confirmation?

04:52:07 25 A. Yes, after confirmation.

04:52:08 1 Q. Is there any data generated as part of the system?

04:52:11 2 A. We -- we generate a log file that logs all of the data
04:52:17 3 that we extract off the image, plus the image of the check.

04:52:26 4 MR. SHEASBY: Can you turn, Mr. Huynh, to PX-1187?

04:52:29 5 Q. (By Mr. Sheasby) Do you have personal knowledge of
04:52:43 6 when the specification of the '681 patent became publicly
04:52:48 7 available?

04:52:50 8 A. Of the '681 patent?

04:52:52 9 Q. Yes.

04:52:56 10 MR. SHEASBY: Why don't we turn -- Mr. Huynh, if
04:52:58 11 you could turn to the -- let me do the following.

04:53:04 12 Q. (By Mr. Sheasby) First, do you have personal knowledge
04:53:05 13 of the specification of the '681 patent?

04:53:07 14 A. I'm familiar with the specifications, yes.

04:53:09 15 Q. And why is that?

04:53:11 16 A. As -- as part of my job as chief architect, part of my
04:53:18 17 responsibility was to work with the developers and
04:53:20 18 engineers and make sure that they were patenting their
04:53:23 19 ideas. We were obviously -- obviously spending a lot of
04:53:27 20 our members' money, and we wanted to make sure we protected
04:53:31 21 that.

04:53:31 22 Q. When was the original patent specification for the '681
04:53:34 23 patent filed?

04:53:34 24 A. For the parent application or for --

04:53:39 25 Q. Yes, sir.

04:53:40 1 A. For the parent application, it was October -- October
04:53:44 2 31st of 2006.

04:53:46 3 Q. Can you show this on the '681 patent?

04:53:49 4 A. Yes.

04:53:51 5 MR. SHEASBY: Mr. Huynh, could we have Page 3,
04:53:54 6 please?

04:53:54 7 A. Page 3. So you can see here in the related U.S.
04:53:58 8 application data, we have the -- the earliest date for the
04:54:04 9 parent application is October 31st of 2006. That's the
04:54:11 10 '200 patent.

04:54:13 11 Q. (By Mr. Sheasby) Do you know -- so the original
04:54:16 12 application -- I withdraw the question.

04:54:18 13 Do you know when the '200 patent became publicly
04:54:22 14 available?

04:54:22 15 A. I believe that was in 2011. And at that point, anybody
04:54:26 16 could look at the specifications.

04:54:27 17 Q. Have you looked at the specifications of the '200
04:54:30 18 patent that was filed on October 31st, 2006, and the
04:54:34 19 specification of the '681 patent?

04:54:36 20 A. The specifications from the two patents are -- are
04:54:39 21 identical.

04:54:41 22 MR. SHEASBY: Your Honor, may I -- may I approach?

04:54:43 23 THE COURT: The witness?

04:54:44 24 MR. SHEASBY: No. May I approach the bench, Your
04:54:46 25 Honor?

04:54:46 1 THE COURT: Approach the bench, counsel.

04:54:48 2 (Bench conference.)

04:55:00 3 MR. SHEASBY: Your Honor, I would request
04:55:02 4 permission that I be allowed to ask Mr. Brady if he has
04:55:07 5 knowledge of the reason that USAA filed for patent
04:55:11 6 applications in 2017. I don't believe this is -- he does
04:55:14 7 have knowledge, and I don't think it's a -- it's a
04:55:15 8 violation of Your Honor's admonition to not discuss patent
04:55:20 9 examiners. But in the excess of caution, I did want to
04:55:23 10 approach before I did so.

04:55:24 11 THE COURT: And the question you want to ask the
04:55:26 12 witness is what?

04:55:27 13 MR. SHEASBY: If he has knowledge as to why USAA
04:55:29 14 filed the continuation applications in 2017.

04:55:33 15 THE COURT: And what do you anticipate his answer
04:55:35 16 will be?

04:55:36 17 MR. SHEASBY: He's going to say that -- he's going
04:55:39 18 to say that the reason the applications were filed is
04:55:41 19 because there was a change in the standards of
04:55:45 20 patentability, and there was a decision made at USAA to
04:55:49 21 re-present the -- or to present new claims to the Patent
04:55:52 22 Office. And that was the reason why the applications were
04:55:54 23 filed in 2017.

04:55:57 24 THE COURT: Is there an objection from the
04:55:58 25 Defendant?

04:55:59 1 MR. HILL: Yes, Your Honor. That's not relevant
04:56:00 2 to any issue in the case. At most, it can -- at best, it
04:56:09 3 would inject confusion to the jury about standards for
04:56:09 4 patentability. It certainly doesn't explain any reason for
04:56:10 5 why they waited as long as they did, why they didn't do it
04:56:14 6 sooner.

04:56:15 7 I just don't see the relevance, Judge. I mean,
04:56:20 8 the fact is they filed it when they filed them. And that's
04:56:23 9 going to be the basis of the written description defense.
04:56:25 10 The jury is going to have to decide the reasoning behind
04:56:27 11 why they filed when they filed.

04:56:29 12 THE COURT: Okay.

04:56:29 13 MR. HILL: It isn't going to help much.

04:56:30 14 THE COURT: Well, if relevance is the objection --

04:56:34 15 MR. HILL: 403 and relevance, Your Honor.

04:56:36 16 THE COURT: Pardon?

04:56:36 17 MR. HILL: 403 and relevance.

04:56:36 18 THE COURT: Okay.

04:56:36 19 MR. HILL: Confusion.

04:56:37 20 THE COURT: I'll overrule that objection.

04:56:38 21 MR. SHEASBY: Thank you, Your Honor.

04:56:41 22 THE COURT: He's a corporate representative. He
04:56:42 23 can speak for the reasons why the corporation acted.

04:56:44 24 All right. Let's proceed.

04:56:46 25 (Bench conference concluded.)

04:57:01 1 Q. (By Mr. Sheasby) The continuation applications that
04:57:03 2 led to the '681 and '605 patents were filed in July 2007.
04:57:09 3 Do you have knowledge as to the reason USAA took this step
04:57:12 4 and filed continuation applications in July of 2017?

04:57:17 5 A. The -- the standards for -- for patents -- for software
04:57:26 6 patents changed in 2016, and so as a result of that, we --
04:57:32 7 we went back and -- and refiled our patents at that point
04:57:38 8 to -- to make sure they complied with the new standards,
04:57:42 9 which they did because they have now been awarded to USAA
04:57:47 10 by the Patent Office.

04:57:48 11 Q. Were there goals that USAA focused on in the research
04:57:52 12 program that led to the patents-in-suit?

04:57:56 13 THE WITNESS: Yes, yes, there were. We had -- I
04:57:59 14 believe I have a slide on this, Mr. Huynh.

04:58:08 15 A. So the first goal was to -- we wanted to be able to
04:58:12 16 transform an everyday consumer device, like a digital
04:58:16 17 camera, or a -- or a smartphone into a check image capture
04:58:23 18 device that could -- that could capture a good quality
04:58:28 19 image of the check.

04:58:29 20 MR. SHEASBY: Mr. Huynh, can you turn to PX-1186,
04:58:32 21 Page 21? And can you pull up Column 4, Lines 1 through 9,
04:58:42 22 Mr. Huynh?

04:58:44 23 Q. (By Mr. Sheasby) Does this passage relate to the types
04:58:46 24 of devices -- does this passage from the '605 patent relate
04:58:51 25 to the types of devices that USAA was deploying in that

04:58:54 1 system?

04:58:55 2 A. Yes. If you look at the bottom three lines, starting
04:58:58 3 with electronics. So we wanted to be able to use
04:59:03 4 electronics that today's consumers actually own or can
04:59:06 5 easily acquire, such as general -- such as a general
04:59:09 6 purpose computer, a scanner, and a digital camera.

04:59:12 7 I think up in the second line, we also called out
04:59:16 8 that we specifically exclude specialized equipment used for
04:59:21 9 check scanning.

04:59:22 10 Q. Was it important to USAA that it focus on consumer
04:59:26 11 devices?

04:59:26 12 A. It was very important for us. We wanted to be able to
04:59:30 13 use devices that our members either already have or -- or
04:59:35 14 would likely -- likely want to have.

04:59:41 15 Q. Mr. Brady, do you know if this same language from the
04:59:45 16 '605 patent occurs in the 2006 parent application?

04:59:48 17 A. Yes, it does.

04:59:53 18 MR. SHEASBY: Can you -- Mr. Huynh, can you turn
04:59:55 19 to Page 23 of the '605 patent? And can you pull up
05:00:04 20 Column 8, Lines 27 through 34.

05:00:06 21 Q. (By Mr. Sheasby) Does this passage relate to USAA's
05:00:09 22 research program?

05:00:11 23 A. Yes, it -- yes, it does, as well. Let me -- if you
05:00:15 24 call out the -- the bottom three lines there, it calls out
05:00:19 25 that we were looking for various digital devices such as

05:00:24 1 PDAs, televisions, MP3 players, we knew televisions had --
05:00:29 2 there were televisions on the market that already had WiFi
05:00:32 3 connections, for example, and -- and MP3 players, as well,
05:00:37 4 and so, you know, this is -- this is pointing out
05:00:41 5 specifically that we knew devices were changing. We knew
05:00:44 6 that there was a lot of -- a lot of these devices were
05:00:50 7 actually coming together in terms of the types of
05:00:52 8 technologies that they allowed and that convergence of all
05:00:56 9 these technologies was occurring.

05:00:58 10 Q. What is the PDA that was being discussed in the
05:01:00 11 research program at USAA?

05:01:02 12 A. PDA, personal digital assistant, it was actually one of
05:01:07 13 the -- the earlier terms for something like a smartphone
05:01:10 14 or -- or tablet, included a general purpose computer, a
05:01:17 15 wireless connectivity, and then also a digital camera.

05:01:21 16 Q. Was it relevant to USAA what the physical box was
05:01:26 17 that -- that housed the digital camera or the general
05:01:30 18 purpose computer?

05:01:30 19 A. That was not relevant to us. We were interested in --
05:01:34 20 in supporting whatever types of devices our consumer -- our
05:01:38 21 members had.

05:01:38 22 Q. Were there additional innovations in USAA's research?

05:01:42 23 A. Yes.

05:01:44 24 THE WITNESS: If -- Mr. Huynh, if you can go back
05:01:47 25 to my slide.

05:01:52 1 A. The second -- the second item I wanted to call out was
05:01:54 2 we wanted to create an application that could be downloaded
05:02:00 3 on to the member's device in order to control that device
05:02:07 4 in the process in order to capture a quality image of the
05:02:12 5 check.

05:02:13 6 MR. SHEASBY: Can you turn to the '605 patent,
05:02:23 7 Page 24, Mr. Huynh, Column 10, 23 to 27?

05:02:29 8 A. Excuse me. So --

05:02:30 9 Q. (By Mr. Sheasby) And let me ask a question, Mr. Brady.

05:02:32 10 A. Yes.

05:02:32 11 Q. Does this passage from the '605 patent relate to the
05:02:36 12 research program?

05:02:37 13 A. There's a couple of words in here, the second line
05:02:41 14 down, we call out that we wanted the -- our members to
05:02:44 15 download a component, and then also the lines -- end of
05:02:54 16 Line 25, we wanted to effectively control certain aspects
05:02:57 17 of capturing the -- the image.

05:03:00 18 Q. Mr. Brady, does this same language occur in the 2006
05:03:08 19 parent specification of the '605 patent?

05:03:08 20 A. Yes, it does.

05:03:08 21 MR. SHEASBY: And turning back to, Mr. Huynh,
05:03:12 22 1186, Page 23, and if you can pull up Column 8, Lines 27
05:03:32 23 through 34, Mr. Huynh.

05:03:34 24 Q. (By Mr. Sheasby) Mr. Brady, does this passage from the
05:03:36 25 '605 patent that discusses PDAs as alternatives to

05:03:40 1 computers appear in the original 2006 specification?

05:03:43 2 A. Yes, it does, as well.

05:03:46 3 Q. Did the use of a downloaded application influence the
05:03:51 4 type of devices that USAA considered could be used with its
05:03:55 5 system?

05:03:57 6 A. We -- we wanted to be able to use any consumer device
05:04:01 7 that could download an application. It would have a device
05:04:06 8 that had a general purpose computer, and we also wanted to
05:04:10 9 be -- the device to be able to capture an image and then
05:04:14 10 upload it to the -- to the bank.

05:04:16 11 Q. Were there any additional innovations in the -- in the
05:04:19 12 research program?

05:04:19 13 A. Yes.

05:04:23 14 THE WITNESS: Mr. Huynh, if you can go back to my
05:04:25 15 slide, please?

05:04:25 16 THE COURT: Mr. Brady --

05:04:25 17 THE WITNESS: Yes.

05:04:26 18 THE COURT: -- Mr. Huynh is not here to take
05:04:28 19 directions from you.

05:04:28 20 THE WITNESS: Okay.

05:04:29 21 THE COURT: The lawyers at the podium will direct
05:04:31 22 the IT people what to do.

05:04:31 23 THE WITNESS: Okay.

05:04:33 24 THE COURT: These are the lawyers' slides as
05:04:35 25 demonstratives to the jury. They're not the witness's

05:04:37 1 slides. Mr. Sheasby will have control of the use of those.

05:04:38 2 THE WITNESS: Very good. Thank you.

05:04:39 3 THE COURT: You're here to answer questions, not
05:04:40 4 to give directions to anybody else.

05:04:42 5 THE WITNESS: Sorry about that, sir.

05:04:43 6 THE COURT: Let's proceed, Mr. Sheasby.

05:04:45 7 Q. (By Mr. Sheasby) Pulling up Demonstrative PDX-5.3, was
05:04:50 8 there a third innovation?

05:04:51 9 A. The -- the third innovation was that we wanted to be
05:04:53 10 able to detect errors such as fraudulent -- fraudulent
05:05:02 11 duplicates, bad routing and account numbers, and image
05:05:05 12 quality, other types of errors all over a distributed
05:05:08 13 network.

05:05:09 14 Q. Did USAA implement the distributed technique?

05:05:13 15 A. Yes, we did implement the distributed technique. We
05:05:16 16 had pieces running on the devices, as well as our servers.

05:05:24 17 Q. Do you know where the OCR of the MICR line and CAR line
05:05:32 18 was done on USAA's system?

05:05:35 19 A. For the OCR, the mobile device would actually invoke a
05:05:39 20 component, and then the component would be running on our
05:05:42 21 server.

05:05:43 22 Q. Did consumer remote deposit capture introduce the
05:05:47 23 potential for increased fraud risks?

05:05:51 24 A. Yes, I -- I believe it did. The -- you know, again, we
05:05:57 25 didn't have access to the physical check, so we couldn't --

05:06:02 1 we couldn't mark it canceled. We couldn't physically alter
05:06:06 2 the check.

05:06:06 3 So we knew that if -- if you take it to a -- to a
05:06:11 4 branch to deposit or to an ATM deposit, it's -- it's going
05:06:14 5 to physically alter the check in some way. Plus, it
05:06:18 6 doesn't give the check back to you generally.

05:06:20 7 So we -- what we were telling our members to do is
05:06:24 8 to destroy the check after they had captured the image of
05:06:27 9 it. We knew that a lot of -- you know, that there would be
05:06:33 10 mistakes that would be made. Plus, we also knew that
05:06:36 11 fraudsters probably wouldn't destroy the check, and would
05:06:41 12 try to deposit the -- the image again.

05:06:45 13 Duplicate detection was a -- was a problem before
05:06:47 14 we introduced consumer remote deposit capture. But what we
05:06:51 15 did with consumer remote deposit capture actually made the
05:06:54 16 problem about a thousand times worse than it was before
05:06:57 17 because now the -- the -- our members still had access to
05:07:02 18 the -- to the check and could -- could potentially deposit
05:07:07 19 again.

05:07:08 20 Q. Can you describe the role that obtaining accurate
05:07:12 21 images of a check plays in fraud prevention?

05:07:14 22 A. Obtaining an accurate image, I think, is -- you know,
05:07:18 23 is really -- everything is crucial. Again, we don't have
05:07:21 24 physical access to the checks so we can't read -- read the
05:07:24 25 magnetic ink off of the check.

05:07:28 1 So the -- the entire process is actually relying
05:07:31 2 on capturing a good quality image off of a consumer device.
05:07:38 3 And once -- once you get the data off of those images, then
05:07:46 4 there's some, you know, traditional systems that bank
05:07:49 5 use -- banks use for doing fraud detection that are pretty
05:07:52 6 inexpensive.

05:07:53 7 Q. What role does USAA's consumer remote deposit capture
05:07:59 8 system play in ensuring a good quality image?

05:08:03 9 A. I think that's what our system is about is ensuring
05:08:06 10 that we get a good quality image off of -- off of a
05:08:09 11 consumer device.

05:08:10 12 Q. Did you, USAA, employ any vendors to provide software
05:08:13 13 components for its systems?

05:08:15 14 A. Yes. Yes, we did. Particularly, for some of the
05:08:21 15 commodity pieces like the -- the OCR, we -- we -- we used
05:08:25 16 some vendors.

05:08:27 17 Q. Have you heard of a company Mitek?

05:08:28 18 A. Yes, I -- I know of Mitek. We used Mitek for a -- we
05:08:34 19 used a component of Mitek for the -- the OCR of the -- the
05:08:41 20 courtesy amount field, which is the handwritten numeral
05:08:46 21 amount of the check, also known as the CAR field, by the
05:08:49 22 way.

05:08:49 23 Q. What was your experience using the Mitek software?

05:08:52 24 A. We -- we ran into issues using the Mitek software. It
05:08:56 25 was pretty obvious that they -- that they had not worked in

05:09:01 1 a real-time environment before, so we ran into issues
05:09:04 2 trying to invoke their -- their system from -- from the
05:09:07 3 mobile application or -- or other device in a real-time.

05:09:11 4 Q. What happened as a result of these problems?

05:09:16 5 A. So as -- as a result of having those problems, we
05:09:22 6 had -- we actually packaged up a set of -- a set of check
05:09:26 7 images that we were working with that we had been testing
05:09:28 8 with, and we sent those check images over to Mitek. And
05:09:34 9 then we had a phone call with them -- I was actually on the
05:09:37 10 phone call at the time when -- and we started walking
05:09:40 11 through the issue we were having, and we were trying to get
05:09:44 12 them to duplicate the -- the problem. They --

05:09:46 13 MR. HILL: Objection, Your Honor. We're getting
05:09:48 14 into hearsay testimony at this point if he's going to
05:09:50 15 describe the other end of a phone conversation.

05:09:53 16 THE WITNESS: I was on the phone conversation.

05:09:55 17 THE COURT: All right. When an objection is made,
05:09:57 18 the witness is --

05:09:57 19 THE WITNESS: I apologize. I apologize. Sorry.

05:09:58 20 THE COURT: The Court rules. I'm going to sustain
05:10:00 21 that objection.

05:10:01 22 Restate -- state your next question, Mr. Sheasby.

05:10:03 23 Q. (By Mr. Sheasby) Did you have any additional meetings
05:10:05 24 with Mitek?

05:10:07 25 A. We -- yes, we ended up bringing Mitek on site, and

05:10:14 1 we -- we established a confidentiality -- confidentiality
05:10:19 2 agreement with Mitek. We -- we had them sitting with our
05:10:25 3 developers. The -- our developers were at a long table
05:10:30 4 where we had our developers, all the devices we were
05:10:34 5 testing with, the checks we were testing with, and then
05:10:36 6 the -- the Mitek engineer was there, as well.

05:10:40 7 And we worked with them to help them improve their
05:10:43 8 software. Rey -- Rey Medina, in particular, one of our --
05:10:47 9 one of our researchers, one of the inventors worked
05:10:52 10 directly with the Mitek engineers to help them improve
05:10:56 11 their software.

05:10:56 12 Q. Do you believe that Mitek knew that USAA was developing
05:11:01 13 a consumer remote deposit capture system?

05:11:01 14 MR. HILL: Objection, Your Honor. Calls for
05:11:03 15 speculation.

05:11:04 16 THE COURT: Sustained.

05:11:05 17 Q. (By Mr. Sheasby) Did USAA publicly announce that it
05:11:08 18 had pending applications that protected Deposit@Mobile?

05:11:09 19 A. Yes, we did. We announced that both on our mobile site
05:11:12 20 and -- and website.

05:11:16 21 MR. SHEASBY: Can you turn to PX-1062, Mr. Huynh?

05:11:19 22 Q. (By Mr. Sheasby) Do you recognize this document,
05:11:24 23 Mr. Brady?

05:11:24 24 A. Yes. This is a -- this is a document from what we call
05:11:30 25 our web content management system. It's part of the code

05:11:35 1 deployment where we -- we will list static text that's
05:11:40 2 going to be displayed in the mobile app or -- or on
05:11:45 3 USAA.com.

05:11:45 4 Q. The disclosure field, where does that language appear?

05:11:48 5 A. That will appear directly -- this is the language that
05:11:52 6 will appear directly on the -- the -- our USAA mobile app,
05:11:58 7 as well as USAA.com.

05:11:59 8 Q. And this is the language that existed as of December of
05:12:03 9 2016?

05:12:03 10 A. Yes, it is.

05:12:04 11 Q. What are the patents listed there?

05:12:08 12 A. We have the '227 patent and the '136. The '227 patent
05:12:14 13 is the parent of the '605 patent, and the '136 patent is
05:12:20 14 the parent of the '681 patent.

05:12:21 15 Q. Has USAA's banking business changed since it created
05:12:26 16 consumer remote deposit capture?

05:12:26 17 A. I would say, yes, we have changed very significantly
05:12:33 18 since we introduced consumer remote deposit capture.

05:12:37 19 Before we -- before we -- we launched consumer remote
05:12:42 20 deposit capture, we were about 25 billion in assets. Now
05:12:47 21 we're almost triple that. We're at over 75 billion in
05:12:50 22 assets.

05:12:53 23 At -- at that time, back in 2005, we had less than
05:12:57 24 a million checking accounts. Now we have over 5 million
05:13:03 25 checking accounts.

05:13:04 1 When we initially launched the consumer remote
05:13:06 2 deposit capture system, we saw an immediate jump in terms
05:13:14 3 of the -- the number of checking accounts opened. And so I
05:13:16 4 think that -- you know, we -- we -- and we've been growing
05:13:18 5 ever since, so I think this has been a huge -- a huge
05:13:21 6 impact on our business.

05:13:23 7 Q. Thank you, Mr. Brady.

05:13:23 8 MR. SHEASBY: I pass the witness, Your Honor.

05:13:24 9 THE COURT: Cross-examination.

05:13:26 10 MR. HILL: Thank you, Your Honor.

05:13:50 11 May I proceed, Your Honor?

05:13:52 12 THE COURT: You may proceed, counsel.

05:13:54 13 MR. HILL: Thank you, Your Honor.

05:13:54 14 CROSS-EXAMINATION

05:13:55 15 BY MR. HILL:

05:13:55 16 Q. Mr. Brady, good afternoon.

05:13:58 17 A. Good afternoon, Mr. Hill.

05:13:59 18 Q. It's nice to meet you. We had a chance to meet just a
05:14:01 19 few minutes ago for the first time.

05:14:01 20 A. It's good to meet you.

05:14:03 21 Q. Welcome to Marshall.

05:14:04 22 Mr. Brady, I have some questions I want to ask you
05:14:06 23 about your testimony. But before I do that, I want to talk
05:14:11 24 about the significance of your role in this case as the
05:14:14 25 corporate representative, okay? Are you with me?

05:14:16 1 A. Uh-huh.

05:14:16 2 Q. All right. Now, you're a special witness in the case
05:14:18 3 because you are a corporate representative for USAA. Do
05:14:22 4 you know what that means?

05:14:23 5 A. I think I have an understanding.

05:14:25 6 Q. All right. So you're not only a fact witness in the
05:14:27 7 case, but you're also the person that USAA has designated
05:14:31 8 as the face of the company, as the corporate representative
05:14:35 9 for purposes of this trial. You understand that, don't
05:14:37 10 you, sir?

05:14:37 11 A. I understand that.

05:14:38 12 Q. And that means that you speak for the company for
05:14:43 13 purposes of its positions before this jury. Do you
05:14:46 14 understand that, sir?

05:14:47 15 A. I understand that.

05:14:48 16 Q. And now, as a corporate representative, you get to sit
05:14:52 17 through all of the opening statements and the testimony of
05:14:56 18 the other witnesses, right?

05:14:58 19 A. Yes, I do.

05:14:59 20 Q. And that's different than the other fact witnesses in
05:15:02 21 this case who -- they have to sit outside the courtroom.
05:15:07 22 They don't get to sit and hear the other witnesses testify
05:15:09 23 or hear those -- those part of the proceedings. Do you
05:15:12 24 understand that?

05:15:12 25 A. I understand that.

05:15:13 1 Q. And, Mr. Brady, you've been here in court today for the
05:15:18 2 openings, correct?

05:15:20 3 A. Correct.

05:15:21 4 Q. All right. And I want to ask you about something we
05:15:25 5 saw in the opening statement earlier today, okay?

05:15:29 6 MR. HILL: Can we get the opening slide,
05:15:39 7 Mr. Bakale, with the Constitution?

05:15:40 8 Q. (By Mr. Hill) Mr. Brady, do you recall seeing this
05:15:43 9 slide during the course of USAA's opening statements?

05:15:45 10 A. Yes, I do.

05:15:46 11 Q. All right. And what this cites to is Article I,
05:15:53 12 Section 8, Clause 8 of the United States Constitution. Do
05:15:59 13 you recognize that, sir?

05:15:59 14 A. Yes, I do.

05:16:00 15 Q. And were you here, Mr. Brady, when USAA said that
05:16:03 16 patent rights are absolute? Do you recall hearing that?

05:16:06 17 A. I -- I believe I do, yes.

05:16:10 18 Q. And that they're a constitutional right.

05:16:12 19 A. Uh-huh, yes.

05:16:13 20 Q. Well, let's take a look at this slide, Mr. Brady, first
05:16:17 21 off, and let's look at what Article I, Section 8 of the
05:16:21 22 Constitution actually says. Do you remember from your
05:16:23 23 government classes, Mr. Brady, how the Constitution is
05:16:27 24 actually broken up?

05:16:29 25 A. If you can refresh my memory, that would be good.

05:16:31 1 Q. Okay. You may recall there's multiple articles to the
05:16:34 2 Constitution, right?

05:16:34 3 A. Uh-huh.

05:16:35 4 Q. And there's at least three articles that set out our
05:16:38 5 three separate branches of government. Do you recall that?

05:16:41 6 A. Yes.

05:16:42 7 Q. Okay. And so you've got Article I, which sets out the
05:16:47 8 powers of the legislative branch, which is the Congress,
05:16:51 9 correct?

05:16:51 10 A. Okay.

05:16:51 11 Q. You've got Article II which addresses the executive,
05:16:57 12 which would be the President?

05:16:58 13 A. Uh-huh, yes.

05:16:59 14 Q. And then you've got Article III which addresses the
05:17:03 15 judicial branch, which is what we're all here doing. It's
05:17:06 16 the judiciary in the federal system.

05:17:08 17 Now, if we look at Article I, what does this say?
05:17:11 18 It says: The Congress shall have the power to promote the
05:17:16 19 progress of science and useful arts by securing for limited
05:17:20 20 times to authors and inventors the exclusive right to their
05:17:22 21 respective writings and discoveries.

05:17:25 22 Did I read that correctly, sir?

05:17:27 23 A. Yes.

05:17:28 24 Q. So what this is doing, Mr. Brady, is this is among the
05:17:33 25 list of the powers that Congress can create laws around; do

05:17:41 1 you understand that?

05:17:41 2 A. I understand that.

05:17:42 3 Q. There's other sections of Article I that say things

05:17:48 4 like that they can raise revenue, you understand?

05:17:51 5 A. Uh-huh, yes.

05:17:51 6 Q. That they have the power to declare war, only Congress

05:17:55 7 has that?

05:17:56 8 A. Yes.

05:17:56 9 Q. And what this says is that Congress can create law

05:18:02 10 about patents, right?

05:18:05 11 A. I would understand that.

05:18:10 12 Q. And that's what Congress ultimately did, right?

05:18:15 13 A. Yes.

05:18:15 14 Q. So when we talk about a patent, this isn't from the

05:18:19 15 Bill of Rights, correct?

05:18:21 16 A. Correct.

05:18:21 17 Q. You know, at the end of the Constitution, we had a

05:18:25 18 later -- an amendment, a set of Bill of Rights; do you

05:18:31 19 recall that?

05:18:31 20 A. I do.

05:18:31 21 Q. And those give people actually constitutional rights,

05:18:33 22 agreed?

05:18:33 23 A. Yes, yes.

05:18:34 24 Q. Things like the right to freedom of religion, right to

05:18:39 25 freedom of the press?

05:18:41 1 THE COURT: All right. Mr. Hill, we don't need to
05:18:43 2 talk about all 10 of the Bill of Rights. I appreciate the
05:18:47 3 civics lesson, but we need to limit it to what's relevant
05:18:51 4 here in the case.

05:18:52 5 MR. HILL: Thank you, Your Honor. Thank you, Your
05:18:54 6 Honor.

05:18:54 7 Q. (By Mr. Hill) But my point here is, Mr. Brady, a
05:18:55 8 patent right is a statutory right. It's something Congress
05:18:59 9 creates under the law, right?

05:19:01 10 A. I understand.

05:19:02 11 Q. And Congress is authorized to do that by the
05:19:05 12 Constitution. But what they do with that power is not a
05:19:08 13 constitutional right; it's ultimately up to Congress,
05:19:12 14 right?

05:19:12 15 A. I understand.

05:19:13 16 Q. And you understand that in the Congressional structure
05:19:18 17 for the patent laws, part of what Congress created were the
05:19:24 18 laws that authorizes juries to review the validity of
05:19:30 19 patents; do you understand that?

05:19:31 20 A. I would agree with that.

05:19:32 21 Q. And they do that because those juries are then a check
05:19:36 22 and balance on the bureaucracy that creates the patents,
05:19:45 23 correct?

05:19:45 24 A. I understand.

05:19:45 25 Q. So you have a Patent Office that grants patents, and

05:19:48 1 you have a jury system that serves as a check and balance
05:19:51 2 on that?

05:19:52 3 THE COURT: Counsel, approach the bench.

05:19:55 4 (Bench conference.)

05:20:00 5 THE COURT: If I'm not mistaken, Mr. Hill, you
05:20:02 6 just called the PTO a bureaucracy. I'm very clear about
05:20:07 7 characterizing that agency of the government either in a
05:20:09 8 positive or a negative way, and calling it a bureaucracy is
05:20:13 9 not a compliment.

05:20:14 10 MR. HILL: Okay. I apologize, Your Honor.

05:20:15 11 THE COURT: I want you to hew to a very clear line
05:20:17 12 on that. You understand?

05:20:18 13 MR. HILL: I do. I do.

05:20:20 14 THE COURT: Let's proceed.

05:20:21 15 (Bench conference concluded.)

05:20:25 16 Q. (By Mr. Hill) Now, Mr. Brady, at the end of this case,
05:20:28 17 when Judge Gilstrap gives the jury the law that it will
05:20:33 18 follow, the actual patent law, if it turns out that patent
05:20:37 19 rights are not, in fact, absolute, what should we make of
05:20:42 20 that?

05:20:45 21 A. I'm not sure I get your point.

05:20:48 22 Q. Well, should we chalk that up, that statement up to
05:20:51 23 overstatement, should we chalk that statement up to
05:20:57 24 mistake, or should we chalk that statement up to something
05:21:00 25 else?

05:21:00 1 A. It seems like it could be one of any reasons.

05:21:05 2 Q. Thank you.

05:21:07 3 MR. HILL: You can take that down, Mr. Bakale.

05:21:14 4 Now, Your Honor, I have a board here that I would
05:21:17 5 like a chance to get positioned to use with Mr. Brady if
05:21:21 6 it's permissible with the Court.

05:21:23 7 THE COURT: As a demonstrative?

05:21:24 8 MR. HILL: Yes, Your Honor.

05:21:25 9 THE COURT: Where do you have in mind to position
05:21:27 10 it, Mr. Hill?

05:21:27 11 MR. HILL: Your Honor, I would ask that I could
05:21:29 12 put it in front of the podium. I believe it could be seen
05:21:32 13 there, or I could get an easel and set it here beside the
05:21:33 14 podium.

05:21:33 15 THE COURT: Let's see the board, and then I'll
05:21:35 16 give you further guidance.

05:21:37 17 MR. HILL: Thank you.

05:21:55 18 Right around here.

05:22:00 19 THE COURT: Where would you propose to position?

05:22:02 20 MR. HILL: Your Honor, I could position an easel
05:22:04 21 here, or I could also, I believe, put it here. And I need
05:22:09 22 to be able to indicate to it. I believe the jury can see
05:22:13 23 it from there. We tried to put the text up high.

05:22:15 24 THE COURT: If you are going to write on it, you
05:22:19 25 need to put it on an easel.

05:22:21 1 MR. HILL: Okay. Thank you, Your Honor.

05:22:22 2 THE COURT: I think the first position by the
05:22:24 3 overhead projector is probably the best.

05:22:26 4 MR. HILL: Over here?

05:22:27 5 THE COURT: Yes.

05:22:28 6 MR. HILL: Okay. Thank you.

05:22:40 7 THE COURT: Thank you for your help, Mr. Sheasby,
05:22:42 8 but the Defendants have plenty of lawyers. You don't need
05:22:45 9 to help them put up their board.

05:22:48 10 MR. HILL: Is this --

05:22:49 11 THE COURT: That's fine.

05:22:49 12 MR. HILL: Okay. Thank you, Your Honor.

05:22:58 13 THE COURT: All right. Mr. Hill, let's proceed.

05:22:59 14 MR. HILL: Thank you, Your Honor.

05:23:00 15 Q. (By Mr. Hill) Now, Mr. Brady, I'd like to see if we
05:23:04 16 can establish some dates together, okay? Are you with me?

05:23:07 17 A. Okay.

05:23:07 18 Q. Now, USAA's Deposit@Home project -- product was
05:23:12 19 launched in the summer of 2006. Did I understand that
05:23:15 20 correct from your testimony?

05:23:16 21 A. That's right. June of 2006.

05:23:18 22 Q. All right. And we've got this timeline here we have,
05:23:20 23 do you see it runs from the pre-2000s through the 2000s and
05:23:25 24 then through the 2010s?

05:23:27 25 A. May I stand up? I can't see it from here.

05:23:30 1 THE COURT: Yes, you can stand if you need to.

05:23:36 2 A. Okay.

05:23:39 3 Q. (By Mr. Hill) And then the date we have here is
05:23:42 4 October 31, 2006. You see that?

05:23:44 5 A. I see that, yes.

05:23:45 6 Q. So the launch of that Deposit@Home product would have
05:23:48 7 been shortly before this October date on our timeline,
05:23:52 8 agreed?

05:23:52 9 A. Agreed. Several months before.

05:23:55 10 Q. Now, USAA filed applications for its very first patents
05:24:06 11 based on the Deposit@Home product on Halloween on
05:24:07 12 October 31, 2006. And that's the date we see here on the
05:24:09 13 timeline, correct?

05:24:10 14 A. I'm not sure I would agree with that exactly.

05:24:16 15 Q. Okay. Can we take a look at the first page of the
05:24:19 16 patent? Do you have the '605 patent there in front of you,
05:24:22 17 sir?

05:24:22 18 A. I do.

05:24:22 19 Q. Does it reflect the filing date? Pardon me.

05:24:34 20 MR. HILL: Pull that down. And if we go to
05:24:37 21 Page 3.

05:24:37 22 Q. (By Mr. Hill) And we see the application data for what
05:24:44 23 was referenced earlier, the October 31 application date.
05:24:47 24 You don't believe that's the application date?

05:24:49 25 A. I believe that's the application date, yes.

05:24:50 1 Q. Okay. All right. And USAA launched its Deposit Mobile
05:24:59 2 product that we discussed earlier, it launched that in
05:25:02 3 2009, correct?

05:25:02 4 A. We launched the Deposit@Mobile brand in -- in May of
05:25:06 5 2009.

05:25:07 6 Q. 2009. All right. So that would have been several
05:25:10 7 years after the filing of the original application that
05:25:15 8 later would lead to the '605 patent, correct?

05:25:18 9 A. That's correct.

05:25:19 10 Q. All right. Now, after USAA launched that Mobile
05:25:25 11 Deposit product in 2009, it got some pretty good press
05:25:29 12 coverage for that launch, didn't it?

05:25:30 13 A. Yes, we did.

05:25:31 14 Q. If we look, for instance, at Plaintiff's Exhibit 57,
05:25:35 15 that's a document you talked about a little earlier, do you
05:25:38 16 recall that?

05:25:38 17 A. I do recall that.

05:25:39 18 Q. And we see there on the first page, it was a New York
05:25:43 19 Times article, correct?

05:25:43 20 A. Yes.

05:25:44 21 Q. And in that New York Times article, it was predicted
05:25:47 22 that other banks would follow USAA and offer some type of
05:25:52 23 mobile deposit capability. Do you recall that?

05:25:56 24 A. Where is that?

05:25:57 25 Q. If we look at the bottom of Page 2.

05:26:06 1 A. Yes.

05:26:09 2 Q. And Mr. Wayne Peacock, an executive at USAA, is quoted
05:26:17 3 in the article there in the middle of Page 2. Let's take a
05:26:21 4 look at that. And he says mobile is going to be a bigger
05:26:28 5 part of how people do commerce and how they interact with
05:26:31 6 their financial institutions. Do you see that, sir?

05:26:33 7 A. Yes, I do see that.

05:26:35 8 Q. That, again, was in 2009 after the specification for
05:26:41 9 these patents. The original version of it had already been
05:26:43 10 filed with the Patent Office, correct?

05:26:44 11 A. This article was in 2009, yes.

05:26:47 12 Q. And what Mr. Peacock predicted there, Mr. Brady, that's
05:26:53 13 exactly what happened, isn't it?

05:26:56 14 A. Mobile is a bigger part.

05:26:59 15 Q. So later in 2009 --

05:27:01 16 MR. SHEASBY: Your Honor.

05:27:01 17 THE COURT: Just a minute.

05:27:02 18 MR. SHEASBY: Your Honor, I object. May we
05:27:04 19 approach briefly?

05:27:05 20 THE COURT: Approach the bench.

05:27:14 21 (Bench conference.)

05:27:16 22 MR. SHEASBY: Your Honor, an issue we had in the
05:27:21 23 last case was the repeated injection of issues regarding
05:27:24 24 other banks into the case. And so if Mr. Hill wants to
05:27:29 25 talk about Wells Fargo, that's fine. But speaking about

05:27:32 1 what lots of other banks are doing is simply not relevant
05:27:35 2 to any issue in this case.

05:27:37 3 THE COURT: Mr. Hill?

05:27:38 4 MR. HILL: Your Honor, the other banks, the
05:27:40 5 activity that goes on here that they just discussed in the
05:27:42 6 context of their own presentation and the success of their
05:27:45 7 invention, it shows the -- the progression of the
05:27:49 8 marketplace.

05:27:50 9 There's no limine on this in this matter. And it
05:27:55 10 shows that the -- it goes to the relevant commercial
05:28:00 11 success of the features that they're claiming as an
05:28:02 12 invention, shows the progress of this technology over time,
05:28:05 13 and shows the development of this -- this industry that
05:28:08 14 they claim to have spawned. I mean, he just walked through
05:28:12 15 this himself.

05:28:13 16 MR. SHEASBY: Your Honor, first off, I said
05:28:14 17 nothing about what other banks were doing, in Mr. Brady's
05:28:18 18 testimony. And this is -- this is a clear example of
05:28:20 19 trying to insert other banks. We dealt with this issue in
05:28:25 20 the last case. There are limines on the subject.

05:28:27 21 We're not talking about licensing other banks.
05:28:29 22 That's been limined out by Judge Payne. And this is
05:28:33 23 connected to the violation of Payne's ruling by saying no
05:28:36 24 one's paid for a license.

05:28:37 25 Now, having said no one's paid for a license, now

05:28:40 1 they're going to talk about all the other banks that are
05:28:40 2 doing it so they can tie together a story that is just not
05:28:47 3 relevant to this case. This is why they weren't allowed to
05:28:48 4 talk about licensing of other banks --

05:28:48 5 THE COURT: Do you believe there's an applicable
05:28:50 6 order in limine here, Mr. Sheasby?

05:28:52 7 MR. SHEASBY: The closest limine is that they
05:28:55 8 limined out any discussion of the USAA licensing program.
05:28:59 9 And I believe that was Motion in Limine -- that was one of
05:29:02 10 Plaintiff's motions in limine. It was 4.

05:29:19 11 THE COURT: All right. I'm going to overrule this
05:29:22 12 objection, but, Mr. Hill, the focus of this examination
05:29:26 13 should be on the Defendant, not on other unnamed
05:29:30 14 institutions.

05:29:31 15 I understand -- I think you have not crossed the
05:29:34 16 line yet, but I think if you continue to go down this road,
05:29:37 17 you will reach a point where you will. But at this point,
05:29:40 18 I'm inclined to let you pursue this as you have.

05:29:44 19 MR. HILL: Okay. Judge, I just want to make sure
05:29:48 20 I'm clear. So you're saying the line is I can't discuss
05:29:53 21 what happened with regard to the industry between 2009 --

05:29:59 22 THE COURT: I --

05:29:59 23 MR. HILL: -- and the present?

05:30:00 24 THE COURT: -- I don't have a problem with
05:30:00 25 discussing the industry. I have a problem with you

05:30:02 1 focusing on other banks other than Wells Fargo.

05:30:05 2 MR. HILL: Okay.

05:30:06 3 THE COURT: As long as the industry is used in a
05:30:09 4 broad, generic sense that includes the Defendant --

05:30:12 5 MR. HILL: Uh-huh.

05:30:13 6 THE COURT: -- it's less problematic than when you
05:30:15 7 sever out the Defendant from other financial institutions
05:30:19 8 and talk about other banks.

05:30:20 9 MR. HILL: Okay.

05:30:20 10 THE COURT: And, again, the thrust of your
05:30:25 11 evidence needs to focus on this Defendant, but I'm not
05:30:28 12 going to preclude you from including this Defendant as a
05:30:32 13 part of the broader financial industry in a relevant
05:30:35 14 question.

05:30:36 15 MR. HILL: Uh-huh. So -- and, Your Honor, the
05:30:38 16 reason I ask is, here would be my question. My question
05:30:41 17 would be: Now, Mr. Brady, what happened then is that
05:30:47 18 mobile deposit -- and I believe this has already come out
05:30:50 19 in his direct examination -- mobile deposit then became
05:30:53 20 successful and was adopted broadly by the industry. I
05:30:57 21 mean, he's testified to this with a story he's already
05:30:58 22 told.

05:30:58 23 MR. SHEASBY: He said nothing about this, and it
05:31:01 24 has no relevance to this case. This is designed for --
05:31:03 25 it's for them to suggest that everyone else uses this, no

05:31:08 1 one else licenses it, and that they shouldn't have to pay
05:31:10 2 for it. This has no relevance whatsoever to this case.
05:31:11 3 And what he just laid out makes it absolutely --

05:31:13 4 MR. HILL: The opening in the case, Your Honor,
05:31:15 5 laid out the development in the industry or the widespread
05:31:19 6 use or adoption of MRDC in the industry. I mean, that is
05:31:22 7 out in the -- in the case currently.

05:31:23 8 MR. SHEASBY: There's nothing in the opening that
05:31:25 9 said anything about the adoption of MRDC by this industry,
05:31:30 10 nothing at all. The words never appeared in the opening.
05:31:33 11 The only place they've appeared is in Mr. -- Mr. Hill's
05:31:36 12 examination of Mr. Brady.

05:31:37 13 THE COURT: All right. The question you just
05:31:38 14 posited to me, Mr. Hill, I think, goes too far. I'm not
05:31:43 15 going to allow you to ask that question.

05:31:46 16 MR. HILL: Your Honor, let me ask this just
05:31:46 17 because it's going to come to this. When we get to the
05:31:47 18 damages experts, they're going to have to talk about the
05:31:49 19 industry and the development of the industry and the
05:31:51 20 commercial success of this product and all these other
05:31:55 21 things about the industry they factored into their
05:31:58 22 Georgia-Pacific analysis. And if we're precluded from even
05:32:01 23 mentioning that, I don't -- I don't know how we address
05:32:03 24 those issues.

05:32:04 25 THE COURT: The damages experts are going to

05:32:06 1 testify pursuant to their reports that are then subject to
05:32:11 2 Daubert practice. The basis on which those experts have
05:32:16 3 relied upon others to reach their opinions is set forth in
05:32:16 4 their reports. That's altogether different than what we're
05:32:19 5 talking about now.

05:32:19 6 MR. HILL: Okay. So I can bring it out through an
05:32:19 7 expert because he addressed it in his report, but I can't
05:32:23 8 address --

05:32:23 9 THE COURT: You can ask an expert about what's in
05:32:25 10 their report.

05:32:26 11 MR. HILL: I'm just trying to find the line,
05:32:28 12 Judge. I'm not arguing with you. I'm trying to make sure
05:32:30 13 I understand because I don't want to walk up there and do
05:32:32 14 something you're unhappy with, so...

05:32:34 15 THE COURT: This is not about keeping me happy.
05:32:36 16 This is about following the rules of procedure --

05:32:39 17 MR. HILL: I understand.

05:32:39 18 THE COURT: -- and hewing to a line that tracks
05:32:42 19 relevant evidence and not irrelevant evidence. There is
05:32:48 20 someplace for a discussion of the industry, but there is a
05:32:54 21 very real risk, and I think Plaintiff is right, that if it
05:32:57 22 goes very far, it's going to focus the jury on parties
05:33:00 23 other than the Defendant. And it's going to lead them to
05:33:04 24 confusion and to consideration of other parties who are not
05:33:07 25 before the Court. And that's not proper. And I'm going to

05:33:10 1 try my best to avoid us getting to that point. That's why
05:33:13 2 I'm giving you the instructions I'm giving you.

05:33:16 3 MR. HILL: Yes, sir. Let me ask this, Your Honor.
05:33:18 4 So in light of that, I need to do a little retooling on
05:33:23 5 some of the things I had in here. This was not a granted
05:33:26 6 motion in limine in this case. So it's not retooling I did
05:33:28 7 in advance, anticipating that I would be changing it. It's
05:33:32 8 5:30 now. I can continue to try to question him awhile and
05:33:32 9 avoid some of these topics, but if we're at a point where I
05:33:32 10 could -- we could stop and I could do that retooling, I'll
05:33:38 11 certainly do it.

05:33:38 12 THE COURT: I don't anticipate you're going to
05:33:41 13 finish your cross before we break for the day, but I'm not
05:33:43 14 ready to quit right now.

05:33:45 15 MR. HILL: Okay.

05:33:46 16 THE COURT: If you've got some other areas, let's
05:33:51 17 pursue those.

05:33:51 18 MR. HILL: All right. Thank you, Your Honor.

05:33:52 19 (Bench conference concluded.)

05:33:56 20 THE COURT: Let's proceed, counsel.

05:34:09 21 Q. (By Mr. Hill) Now, Mr. Brady, do you have an
05:34:14 22 understanding of when Wells Fargo launched its first Mobile
05:34:19 23 Deposit application?

05:34:19 24 A. I do not.

05:34:20 25 Q. That was at the end of 2012?

05:34:22 1 A. Okay.

05:34:22 2 Q. You weren't -- you weren't aware of that fact, sir?

05:34:24 3 A. No.

05:34:25 4 Q. All right. Now, what we see here on the timeline that
05:34:30 5 we just talked about, the October 31, 2006, original
05:34:38 6 filings by USAA, and then we mentioned the 2009 launch of
05:34:47 7 the USAA mobile app. We also mentioned the 2012 launch of
05:34:51 8 the Wells Fargo mobile app. All of those things occurred,
05:34:53 9 sir, before 2017, correct?

05:34:54 10 A. That's true.

05:34:56 11 Q. And USAA then -- this is all before USAA applies for
05:35:03 12 the '605 and the '681 patents, correct?

05:35:08 13 A. For the '605 and the '681.

05:35:11 14 Q. Because those applications were filed July 2017,
05:35:17 15 correct?

05:35:17 16 A. That's when those applications were filed.

05:35:19 17 Q. So by the time that USAA filed for the two patents that
05:35:28 18 we're here about, Mobile Deposit had become a rolled out
05:35:36 19 capability for both USAA and for Wells Fargo, correct?

05:35:38 20 A. For those two, yes.

05:35:40 21 Q. So let's talk about those two patent applications a
05:35:52 22 little bit, Mr. Brady.

05:35:54 23 Now, USAA made a request to the PTO with each of
05:35:56 24 those applications for something that is called Track 1
05:36:02 25 requests. Are you familiar with that?

05:36:04 1 A. I do not know what that is.

05:36:05 2 Q. All right. Well, let me show you in the patent
05:36:08 3 application itself, Defendant's Exhibit 8 -- excuse me,
05:36:11 4 Defendant's Exhibit 8, at Page 542 -- excuse me, at Page --
05:36:25 5 yeah, 542.

05:36:27 6 MR. HILL: I tell you what, first let's go to
05:36:29 7 Page 575, Mr. Bakale.

05:36:33 8 THE COURT: I tell you what, while you're looking
05:36:35 9 for that, Mr. Hill, we're going to take this opportunity to
05:36:38 10 have a short recess, ladies and gentlemen.

05:36:39 11 I'm going to ask you simply to close your
05:36:41 12 notebooks, leave them in your chairs. Follow all the
05:36:43 13 instructions I've given you, including not to discuss the
05:36:46 14 case among yourselves.

05:36:47 15 This will probably be the last recess for the day,
05:36:49 16 and we'll try to keep it short. With that, the jury is
05:36:52 17 excused for recess.

05:36:53 18 COURT SECURITY OFFICER: All rise.

05:37:11 19 (Jury out.)

05:37:18 20 THE COURT: The Court stands in recess.

05:37:21 21 COURT SECURITY OFFICER: All rise.

05:37:23 22 (Recess.)

05:46:18 23 (Jury out.)

05:46:19 24 COURT SECURITY OFFICER: All rise.

05:46:21 25 THE COURT: Be seated, please.

05:46:22 1 Are you prepared to continue with your
05:46:29 2 cross-examination, Mr. Hill?

05:46:30 3 MR. HILL: Yes, sir.

05:46:32 4 THE COURT: All right. Then you may return to the
05:46:34 5 podium.

05:46:34 6 While that's going on, Ms. Denton, if you'll bring
05:46:37 7 in the jury.

05:46:39 8 COURT SECURITY OFFICER: All rise.

05:46:59 9 (Jury in.)

05:47:00 10 THE COURT: Please be seated.

05:47:05 11 All right. Counsel, you may proceed with your
05:47:10 12 cross-examination of the witness.

05:47:11 13 MR. HILL: Thank you, Your Honor.

05:47:12 14 Q. (By Mr. Hill) Mr. Brady, before we broke, we were
05:47:14 15 talking about Defendant's Exhibit 8 and the fact that USAA
05:47:18 16 had made what was known as a Track 1 request to the Patent
05:47:22 17 Office. And I was looking specifically at Page 575 of that
05:47:25 18 document.

05:47:29 19 Are -- are you familiar with what it means to make
05:47:32 20 a Track 1 request?

05:47:33 21 A. I am not.

05:47:34 22 Q. Now, when USAA originally filed these --

05:47:50 23 MR. HILL: Go ahead and take that down,
05:47:54 24 Mr. Bakale. Thank you.

05:47:55 25 Q. (By Mr. Hill) When USAA originally filed these two

05:47:55 1 applications in 2017 that would lead to the '605 and '681
05:47:55 2 patents, it also did not ask the PTO, the Patent Office, to
05:48:01 3 consider these patents as children or grandchildren of any
05:48:05 4 earlier USAA patents? Are you aware of that fact, sir?

05:48:08 5 A. That -- that's not my understanding.

05:48:11 6 Q. Okay. Well, let's take a look at Defendant's
05:48:14 7 Exhibit 8. And if we look at Page 585, and we look here at
05:48:22 8 the section toward the bottom of the page, what we see is a
05:48:29 9 section that allows for the applicant to claim benefit
05:48:32 10 under some statutes to other applications. And you'll note
05:48:42 11 there's nothing filled in there. Do you see that, sir?

05:48:42 12 A. I do see that.

05:48:42 13 MR. HILL: All right. And, Your Honor, may we
05:48:44 14 approach, briefly?

05:48:44 15 THE COURT: Approach the bench.

05:48:45 16 (Bench conference.)

05:48:57 17 THE COURT: What is it, Mr. Hill?

05:48:58 18 MR. HILL: Your Honor, just out of caution, I want
05:49:00 19 to ask about what I'm going to next, which is to point out
05:49:03 20 to this witness that the two applications were then
05:49:05 21 rejected in October of 2017 based on -- and at that time,
05:49:12 22 USAA made the request that they be -- relate back to the
05:49:17 23 original applications. But before I did that, I wanted to
05:49:19 24 make sure that I wasn't going to -- the Court wouldn't view
05:49:23 25 that as improper.

05:49:24 1 THE COURT: Is there an objection from the
05:49:26 2 Plaintiff?

05:49:26 3 MR. SHEASBY: So he hasn't laid his foundation
05:49:29 4 that this witness has personal knowledge of the patent
05:49:31 5 prosecution history, if he has that expertise. And so if
05:49:35 6 he's just going to be tested -- you know, giving argument
05:49:37 7 through a witness, that doesn't make any sense. That's not
05:49:40 8 the purpose of cross-examination. He should establish that
05:49:43 9 our corporate representative doesn't know about the
05:49:45 10 prosecution history, and he should move on.

05:49:47 11 MR. HILL: Your Honor, the corporate
05:49:49 12 representative speaks for the company. He can speak
05:49:51 13 outside his personal knowledge. To the extent he knows,
05:49:53 14 I'm entitled to ask him. He's already testified about his
05:49:56 15 familiarity with the specifications in these patents and
05:49:58 16 also with the filing timelines. So...

05:50:02 17 THE COURT: He's testified that he's not familiar
05:50:03 18 with the Track 1 process.

05:50:05 19 MR. HILL: With the Track 1 process, yes, Your
05:50:07 20 Honor. This is not the Track 1 process. This is a request
05:50:10 21 that they now have the earlier patent application --

05:50:13 22 THE COURT: You can ask him the question for the
05:50:15 23 prosecution history. If he doesn't have any personal
05:50:17 24 knowledge of it, then you're going to need to drop it and
05:50:20 25 move on.

05:50:20 1 MR. HILL: Okay.

05:50:20 2 MR. SHEASBY: Your Honor, can I request that I get
05:50:24 3 copies of the exhibits so I can cross-examine -- redirect
05:50:30 4 the witness. I don't know that they have them.

05:50:31 5 THE COURT: Well, you should -- each side should
05:50:32 6 have the other one's exhibits long before now. If they
05:50:35 7 don't, there's a problem.

05:50:35 8 MR. HILL: We've exchanged exhibits, Your Honor.
05:50:40 9 They have our exhibits.

05:50:40 10 MR. SHEASBY: I don't have the physical exhibits.
05:50:44 11 That's the problem. We didn't get the binders.

05:50:45 12 THE COURT: We're not -- we're not going to get to
05:50:47 13 redirect today, but we'll make -- make sure you do that
05:50:49 14 overnight.

05:50:50 15 MR. HILL: Yes, Your Honor.

05:50:51 16 THE COURT: Let's proceed.

05:51:01 17 Q. (By Mr. Hill) Now --

05:51:02 18 THE COURT: Let's proceed.

05:51:03 19 MR. HILL: Thank you, Your Honor.

05:51:04 20 Q. (By Mr. Hill) Now, Mr. Brady, are you aware that in
05:51:06 21 response to that original application, the Patent Office
05:51:08 22 rejected the applications?

05:51:10 23 A. I'm not aware of that.

05:51:11 24 Q. And that after that, sir, are aware that USAA then --

05:51:13 25 MR. SHEASBY: Your Honor, objection. This is

05:51:15 1 exactly what I think we addressed.

05:51:20 2 MR. HILL: Your Honor, I asked if the witness was
05:51:21 3 aware of the fact and he answered he was not --

05:51:23 4 THE COURT: I'll overrule the objection.

05:51:31 5 Q. (By Mr. Hill) After that, Mr. Brady, are you aware
05:51:31 6 that USAA corrected its applications to claim priority to
05:51:33 7 the original 2006 filing?

05:51:35 8 A. I'm not aware of that fact.

05:51:37 9 Q. And you understand, Mr. Brady, that these two patents,
05:51:43 10 the '605 and the '681, were eventually issued, correct?

05:51:47 11 A. Yes.

05:51:47 12 Q. And they were both issued on July 3rd, 2018, correct?

05:51:54 13 A. Yes.

05:51:55 14 Q. And that's less than one year after their filing date;
05:51:58 15 isn't that right, sir?

05:51:59 16 A. Yes.

05:52:01 17 Q. And then do you also understand that USAA filed this
05:52:04 18 lawsuit against Wells Fargo on these two new patents about
05:52:08 19 a month later?

05:52:10 20 A. I believe that's about when it was.

05:52:13 21 Q. Now --

05:52:25 22 THE COURT: Are you going to continue to use this
05:52:27 23 board with the witness, Mr. Hill?

05:52:28 24 MR. HILL: Your Honor, I am going to come back to
05:52:30 25 it briefly, but I can set it down in the meantime if that

05:52:36 1 would be helpful.

05:52:37 2 THE COURT: As long as you're going to come back
05:52:38 3 to it.

05:52:39 4 MR. HILL: All right.

05:52:41 5 Q. (By Mr. Hill) Now I want to talk a little more,
05:52:43 6 Mr. Brady, about this idea that USAA's '605 and '681
05:52:46 7 patents relate back to the applications filed by USAA on
05:52:50 8 October 31, 2006, okay? Are you with me?

05:52:54 9 A. Okay.

05:52:54 10 Q. All right. What I understand that means is that the
05:52:57 11 specification for the '605 and the '681 patents were
05:53:02 12 originally submitted back in 2006. Is that what you
05:53:06 13 understand it to mean?

05:53:07 14 A. That's what I understand it to mean.

05:53:09 15 Q. All right. And are you familiar with the parts of a
05:53:12 16 patent, sir?

05:53:12 17 A. Somewhat familiar, yes.

05:53:14 18 Q. Okay. Do you have a copy -- you talked about the
05:53:17 19 specification of the '605 and '681 in your direct
05:53:21 20 testimony. Do you have a copy of those patents in front of
05:53:23 21 you, sir?

05:53:23 22 A. I do, yes.

05:53:24 23 Q. And if you'll take a look, the '605 and the '681
05:53:30 24 patents, each have some introductory pages, correct?

05:53:35 25 A. Yes.

05:53:38 1 MR. HILL: And can we get those up, Defendant's
05:53:41 2 Exhibit 4, please, Mr. Bakale.

05:53:44 3 Q. (By Mr. Hill) We'll look through it together. So I'm
05:53:47 4 looking at the '605 patent, and it's got this initial front
05:53:51 5 page. And if we thumb forward 10 or 12 pages, we get to
05:53:56 6 some figures. Okay. Do you see the first figure,
05:54:04 7 Figure 1?

05:54:04 8 A. I see that.

05:54:05 9 Q. All right. Now, if we then look through the patent to
05:54:09 10 the very end, I believe in the '605 patent, it's going to
05:54:16 11 be in Column 15, and we can talk about patents, Mr. Brady,
05:54:22 12 in reference to the column numbers at the top of the page.
05:54:25 13 Are you familiar with that practice?

05:54:25 14 A. I am familiar with that.

05:54:26 15 Q. If we look in Column 15, we see a section that begins
05:54:32 16 "what is claimed"; do you see that?

05:54:33 17 A. I see that, yes.

05:54:34 18 Q. All right. And so what appears between where those
05:54:37 19 figures start and where it says what is claimed, that's the
05:54:40 20 specification, isn't it?

05:54:41 21 A. These -- no.

05:54:44 22 Q. That's not the specification?

05:54:45 23 A. It -- it's -- it -- it's informed by the specification.

05:54:52 24 Q. Okay. I'm talking about the actual physical part of
05:54:55 25 the patent, sir, that appears between where the figures

05:54:58 1 start?

05:54:58 2 A. Oh, where the figures start.

05:55:00 3 Q. Yes, sir and where we get to right here.

05:55:02 4 A. Sorry, I misunderstood.

05:55:04 5 Q. So going that way.

05:55:05 6 A. Yes, those are the specification.

05:55:07 7 Q. That's the specification, right?

05:55:09 8 A. Yes.

05:55:09 9 Q. And so if the jury wants to know what was filed in
05:55:13 10 2006, all they have to do is look in their notebook; isn't
05:55:13 11 that right?

05:55:21 12 A. I don't know that they have the '200 patent in their
05:55:25 13 notebooks.

05:55:26 14 Q. Well, didn't you -- did I hear you testify that that
05:55:29 15 specification is identical to the specification for the
05:55:32 16 '605?

05:55:32 17 A. The specifications are identical, yes.

05:55:34 18 Q. Okay. And so if the jury wants to know what was filed
05:55:38 19 in 2006, all they have to do is look in their notebook,
05:55:43 20 correct?

05:55:43 21 A. I partially agree with that.

05:55:46 22 Q. Okay. And what we will find in the notebook in the
05:55:51 23 '605 patent from where the pictures start to this spot
05:55:54 24 right here I've marked on the screen is the 2006
05:55:58 25 specification, correct?

05:56:00 1 A. Yes.

05:56:05 2 Q. All right. And the same can be said, can't it, of the
05:56:08 3 '681 patent?

05:56:08 4 MR. HILL: Can we go to Defendant's Exhibit 5,
05:56:12 5 Mr. Bakale. Excuse me, Defendant's Exhibit 5, I believe it
05:56:25 6 is, is that the '681 patent -- oh, Exhibit 3, I apologize.

05:56:33 7 Q. (By Mr. Hill) This is our '681 patent, correct,
05:56:35 8 Mr. Brady?

05:56:36 9 A. That's correct.

05:56:37 10 Q. And, again, with the '681, if we flip forward a few
05:56:41 11 pages, we'll get to the figures. All right. There we have
05:56:48 12 Figure 1 again?

05:56:49 13 A. Uh-huh, yes.

05:56:50 14 Q. And if we go to near the end, we'll see the claims
05:56:55 15 begin in the '681 patent at the bottom of Column 13?

05:57:03 16 A. Yes.

05:57:04 17 Q. Isn't that right, sir?

05:57:05 18 A. Uh-huh.

05:57:06 19 Q. Right there. So, again, going that way, everything
05:57:09 20 from where the picture started to where I've marked there
05:57:13 21 on the screen is the 2006 portion of the specification
05:57:17 22 which has been included identically in the '681 patent,
05:57:21 23 correct, sir?

05:57:21 24 A. Yes, sir.

05:57:25 25 Q. So the very first part of the patent, the first few

05:57:29 1 pages and then the claims at the end, those parts were
05:57:32 2 written in 2017, correct?

05:57:36 3 A. I'm sorry, say that again.

05:57:37 4 Q. Yes, sir. The very first part of the patent, the
05:57:40 5 initial pages with the date of issuance and the abstract
05:57:45 6 and the name of the inventors, and then the claims at the
05:57:50 7 end, those portions of the patents were written in 2017,
05:57:57 8 correct, sir?

05:57:57 9 A. I'm not sure that's entirely correct.

05:58:00 10 Q. Well, they were filed with the Patent Office in 2017;
05:58:02 11 would you agree with that?

05:58:02 12 A. Yes, I would agree with that.

05:58:03 13 MR. HILL: Go ahead and take this down,
05:58:06 14 Mr. Bakale.

05:58:08 15 Q. (By Mr. Hill) And so in 2017, USAA submitted new
05:58:31 16 claims based on the 2006 specification, correct, sir?

05:58:37 17 A. Yes.

05:58:38 18 Q. And you understand it, Mr. Brady, is that something
05:58:43 19 that's allowed by the patent laws?

05:58:47 20 A. I'm not a patent attorney.

05:58:49 21 Q. Okay. So you just don't know one way or the other?

05:58:52 22 A. My understanding is it's allowed, but I'm not a patent
05:58:55 23 attorney, sir.

05:58:56 24 Q. All right. Are you aware of the fact, as USAA's
05:58:59 25 corporate representative in this case who's here to speak

05:59:01 1 for the company on the basis of its claims and defenses in
05:59:03 2 this case, are you aware of the fact that USAA contends
05:59:08 3 that what was filed in 2006 supports those later claims?
05:59:15 4 A. You're saying what was filed in 2006 supports those
05:59:19 5 later claims?

05:59:19 6 Q. Yes, sir.

05:59:20 7 A. I believe it does, yes.

05:59:21 8 Q. And are you aware of the fact, sir, that in order to be
05:59:25 9 entitled to that 2006 priority date, in fact, the claims
05:59:29 10 have to be supported by that 2006 specification? Do you
05:59:34 11 understand that?

05:59:36 12 A. Yes.

05:59:37 13 Q. Because if the claims aren't supported by the 2006
05:59:41 14 specification, then they're invalid, correct?

05:59:45 15 A. Again, I'm not -- I'm not a patent attorney.

05:59:48 16 Q. And do you understand that that's the issue that USAA
05:59:54 17 asserts in the case, that that's the issue that it joins
05:59:57 18 with Wells Fargo in this case legally?

05:59:59 19 A. I understand, yes.

06:00:00 20 Q. And that's what's known as the written description
06:00:04 21 requirement of the patent laws; you understand that, sir?

06:00:06 22 A. I have not heard that before.

06:00:08 23 Q. And as USAA's corporate representative, are you here to
06:00:17 24 claim before this jury that you believe that the 2006
06:00:21 25 specification provides a written description of the full

06:00:27 1 scope of the claims for the 2017 filings of the '605 and
06:00:33 2 '681 patent?

06:00:33 3 MR. SHEASBY: Your Honor, I object. He testified
06:00:37 4 he doesn't understand the words written description. I
06:00:41 5 request that counsel rephrase the question. It's unfair to
06:00:43 6 the witness.

06:00:48 7 MR. HILL: Your Honor, I'll --

06:00:49 8 THE COURT: Just a minute, Mr. Hill.

06:00:50 9 MR. HILL: Yes, sir.

06:00:51 10 THE COURT: I think it calls for a legal
06:00:59 11 conclusion. I'm going to sustain the objection.

06:01:01 12 You may rephrase it in some other fashion, or move
06:01:05 13 on.

06:01:06 14 MR. HILL: Thank you, Your Honor.

06:01:07 15 Q. (By Mr. Hill) Well, Mr. Brady, let me just summarize
06:01:11 16 it this way: As USAA's corporate representative, you
06:01:14 17 understand that the issue that's being joined in this
06:01:16 18 courtroom, the disagreement that Wells Fargo has with USAA
06:01:20 19 is over this issue of whether that 2006 specification
06:01:24 20 discloses the full scope of these 2017 patent claims. Do
06:01:30 21 you understand that?

06:01:30 22 A. I understand that's the issue.

06:01:33 23 Q. And you understand Wells Fargo contends that it does
06:01:35 24 not, and USAA contends the opposite?

06:01:38 25 A. Yes.

06:01:40 1 Q. All right. Now, Mr. Brady, in addition to claiming
06:01:47 2 that these patents were filed -- that its patents filed in
06:01:52 3 2017 should get to count as having been filed in 2006, USAA
06:01:56 4 also claims in this case that these patents are worth a lot
06:01:58 5 of money, right?

06:01:59 6 A. I believe so.

06:02:00 7 Q. And USAA is going to ask the jury in this case,
06:02:06 8 Mr. Brady, for an award of over a hundred million dollars
06:02:10 9 in lawsuit damages just for the alleged inventions in these
06:02:14 10 two patents; isn't that right, sir?

06:02:16 11 A. That is correct.

06:02:17 12 Q. But would it be fair, Mr. Brady, for USAA to recover
06:02:22 13 money for things that USAA didn't invent in these patents?

06:02:29 14 A. That would not be fair.

06:02:31 15 Q. That wouldn't be right, would it, sir?

06:02:34 16 A. Yes.

06:02:37 17 Q. If USAA didn't invent it, they shouldn't be able to ask
06:02:42 18 that other people have to pay them for it; would you agree
06:02:45 19 with that?

06:02:45 20 A. I would agree.

06:02:48 21 Q. And are you aware, Mr. Brady, that the law actually
06:02:51 22 requires USAA to take care to only seek those damages that
06:02:57 23 are attributable to the claimed invention and nothing more?

06:03:00 24 A. Again, I'm not --

06:03:02 25 MR. SHEASBY: Your Honor, objection. This calls

06:03:04 1 for a legal conclusion.

06:03:04 2 MR. HILL: I asked about his awareness, Your
06:03:08 3 Honor.

06:03:08 4 THE COURT: Are you familiar with that portion of
06:03:10 5 the patent statute, Mr. Brady?

06:03:11 6 THE WITNESS: I'm not a patent attorney. I'm not
06:03:13 7 familiar.

06:03:13 8 THE COURT: All right. Let's move on.

06:03:16 9 Q. (By Mr. Hill) Well, Mr. Brady, would it make sense to
06:03:20 10 you for the jury to have an idea of what USAA claims to
06:03:24 11 have invented in these patents versus what existed before,
06:03:29 12 that they would need to have an idea of what USAA claims to
06:03:32 13 have invented in these patents, versus what you -- what
06:03:35 14 actually existed before the filing in October of 2006?

06:03:39 15 A. I'm sorry, can you repeat that one more time?

06:03:42 16 Q. And I apologize, sir. I stumbled on that question.

06:03:44 17 A. I'm following.

06:03:45 18 Q. So, Mr. Brady, the jury has to have an idea of what
06:03:52 19 USAA claims to have invented in these patents versus what
06:03:56 20 existed before it filed the 2006 applications, right?

06:04:02 21 A. Versus what existed before the 2006 patents?

06:04:07 22 Q. Yes, sir.

06:04:08 23 A. Yes.

06:04:08 24 Q. And what that does is that helps the jury know whether
06:04:14 25 the claimed inventions in these two patents are a big deal

06:04:18 1 or a small step or just the assembling of known ideas,
06:04:23 2 doesn't it?

06:04:23 3 MR. SHEASBY: Your Honor, I object. This is
06:04:25 4 clearly outside the defenses that have been brought in this
06:04:27 5 case. This violates a motion in limine.

06:04:30 6 THE COURT: Approach the bench, counsel.

06:04:31 7 (Bench conference.)

06:04:40 8 THE COURT: What limine does this violate,
06:04:43 9 Mr. Sheasby?

06:04:44 10 MR. SHEASBY: They're trying to present a 103
06:04:48 11 defense. What was known in --

06:04:50 12 THE COURT: Slow down.

06:04:51 13 MR. SHEASBY: What was known in 2006 has no
06:04:53 14 relevance whatsoever to damages. It could only go to one
06:04:56 15 thing, which is to validity. What matters for the
06:04:59 16 hypothetical negotiation is what the alternatives that were
06:05:02 17 available --

06:05:03 18 THE COURT: I asked you for a MIL. You said there
06:05:05 19 was a MIL violation. I asked you what MIL you believe they
06:05:11 20 violated.

06:05:11 21 MR. SHEASBY: We MIL'd out dropped defenses. Both
06:05:15 22 of us agreed to it. It was Defendant's MIL -- it was MIL
06:05:18 23 No. -- I believe it was their MIL against us.

06:05:21 24 MS. GLASSER: And this is actually filed --

06:05:27 25 MR. SHEASBY: It's Defendant's MIL.

06:05:45 1 MS. GLASSER: It's 104.

06:05:53 2 THE COURT: While she's looking for that,
06:05:55 3 Mr. Hill.

06:05:58 4 MR. HILL: Your Honor, I'm not making a 103
06:06:00 5 anything.

06:06:01 6 THE COURT: I understand, but you're asking
06:06:02 7 questions of a witness that are clearly beyond his personal
06:06:04 8 knowledge, and you're asking him not so much of the answers
06:06:08 9 in a yes or no so the jury can hear the question that
06:06:10 10 you've asked. You need to pursue areas where this witness
06:06:13 11 has established a level of personal knowledge.

06:06:15 12 MR. HILL: Absolutely. Let me tell you what I'm
06:06:19 13 about to do, Judge, so you'll know.

06:06:22 14 THE COURT: Let's make sure that we all talk one
06:06:24 15 at a time up here.

06:06:25 16 MR. HILL: I'll tell you what I'm about to do.
06:06:25 17 So what I was asking him is, for the jury to assess the
06:06:29 18 patent's value, the difference over the prior art, which is
06:06:32 19 completely proper under Georgia-Pacific No. 9, they have to
06:06:35 20 know what existed before and what this added, the inventive
06:06:35 21 step.

06:06:40 22 And now what I'm about to do is go to a number of
06:06:42 23 things that have already been -- the jury has already seen
06:06:47 24 from opening statements, but I believe this witness, based
06:06:50 25 on his personal knowledge in the banking industry, will

06:06:52 1 agree were banking technologies that existed prior to 2006.

06:06:56 2 So when they get ready to value this invention,
06:07:00 3 they can't value that part. It's apportionment argument,
06:07:02 4 Your Honor.

06:07:02 5 MR. SHEASBY: Your Honor, that is absolutely
06:07:04 6 improper. Rule No. 4 is dropped defenses. They have no
06:07:10 7 102/103 defense based any prior art as to these patents.
06:07:12 8 What was relevant in -- what was known in 2006 has no
06:07:15 9 relevance to the issue of damages. Damages would solely be
06:07:18 10 assessed from the time of the hypothetical negotiation.

06:07:20 11 This is a surreptitious 102/103 defense. And
06:07:27 12 every -- that existed before 2006 is completely irrelevant.
06:07:27 13 They have to lay the foundation of what existed before 2006
06:07:30 14 was a non-infringing alternative, and then set it up that
06:07:32 15 way.

06:07:33 16 What he's doing right now is surreptitiously
06:07:37 17 trying -- it's irrelevant to damages. Damages are judged
06:07:40 18 from the time of the hypothetical negotiation. It's about
06:07:42 19 the non-infringing alternatives that would exist at the
06:07:45 20 time of the hypothetical negotiation.

06:07:47 21 And what's worse is that this was their request.
06:07:49 22 They want no dropped defenses. And so what's going to
06:07:53 23 happen after he does this? Am I going to get on the stand
06:07:56 24 and cross-examine Mr. Saffici --

06:07:56 25 THE COURT: Slow down, Mr. Sheasby. I'm trying to

06:07:59 1 follow what you say, but you're awfully fast.

06:08:01 2 MR. SHEASBY: I am fast this evening, Your Honor.

06:08:03 3 It just opens up -- so now we have to talk about
06:08:07 4 the fact what was known and not known in 2006. Why are we
06:08:07 5 fighting about --

06:08:07 6 MR. HILL: Here's what --

06:08:10 7 MR. SHEASBY: That's not relevant to damages. He
06:08:11 8 should have asked about the state of the art in 2012 when
06:08:15 9 Wells Fargo launched their system or the state of the art
06:08:17 10 in 2018, which is the date of the hypothetical negotiation.
06:08:22 11 That would be the only relevant inquiry.

06:08:25 12 MR. HILL: Your Honor, if he's telling me from an
06:08:28 13 apportionment argument that I can argue the things that
06:08:31 14 were post-priority date, that should be factored out
06:08:36 15 in an -- in an apportionment of the value of these patents
06:08:39 16 what they added over the prior art, I think that's wrong.
06:08:39 17 That'd make my case a lot easier.

06:08:46 18 But here's where the rubber meets the road, Judge.
06:08:48 19 Their damages expert says that the value of this invention
06:08:51 20 comes from its fraud detection features and its duplicate
06:08:56 21 detection features, all features that existed in banks and
06:08:59 22 in banking processes before these applications were ever
06:09:02 23 filed for.

06:09:02 24 And so it is directly relevant from setting up
06:09:05 25 their damages case, the fact that their damage experts

06:09:09 1 point to the value of this invention as being its addition
06:09:12 2 of known features, known features that had existed before,
06:09:18 3 which we all know have to be --

06:09:21 4 THE COURT: Known features --

06:09:21 5 MR HILL -- apportioned.

06:09:22 6 THE COURT: -- known features that are carried out
06:09:25 7 at a traditional brick and mortar bank versus known
06:09:28 8 features that are allowed to be done remotely?

06:09:28 9 MR. HILL: Known features that were done
06:09:31 10 electronically in remote deposit capture channels, and this
06:09:37 11 witness can tell me about it because he's got the personal
06:09:40 12 knowledge.

06:09:40 13 MR. SHEASBY: He should be talking solely about
06:09:45 14 the state of the art and the hypothetical negotiations.
06:09:45 15 That's relevant. Talk about what existed before the patent
06:09:47 16 was filed. He hasn't even laid the foundation that's a
06:09:50 17 non-infringing alternative.

06:09:51 18 This is completely a surreptitious 103 defense,
06:09:55 19 and it shouldn't be done. It -- the non-infringing
06:10:01 20 alternative is something that they can discuss. So let
06:10:04 21 them set out what the non-infringing alternative is, and
06:10:06 22 we -- and Mr. Brady can talk about that.

06:10:08 23 But simply listing things that were known in the
06:10:10 24 prior art before 2006, that has no relevance to damages.
06:10:16 25 There's no case law that suggests that's relevant to

06:10:18 1 damages, none.

06:10:18 2 MR. HILL: Your Honor, that's just incorrect.

06:10:20 3 Georgia-Pacific Factor 9 says the jury -- the requirement
06:10:23 4 that the jury apportion damages --

06:10:25 5 THE COURT: If you're going to apportion,
06:10:27 6 Mr. Hill, you don't apportion against the entirety of the
06:10:30 7 financial sector. You apportion with regard to a
06:10:33 8 multi-component processor device as to the components that
06:10:37 9 do not bring value per the patents. You don't go outside
06:10:42 10 that device or that process.

06:10:44 11 MR. HILL: And that's it, Your Honor. So what I'm
06:10:45 12 about to point out are portions of the patent. These are
06:10:49 13 requirements of the patent in spots that they say do
06:10:52 14 duplicate detection. That's one of the claim elements.

06:10:54 15 And the point is, duplicate detection has been
06:10:58 16 done for decades. And so when you do value these patents,
06:11:02 17 whatever they invented, whatever it is that should be
06:11:03 18 valued for this invention, it shouldn't be that part. If
06:11:10 19 it's -- if it's --

06:11:10 20 MS. GLASSER: Question that analysis --

06:11:15 21 MR. HILL: -- if it's -- if it's doing -- I lost
06:11:15 22 my point, Your Honor, from the interruption.

06:11:17 23 THE COURT: If there's some portion of this device
06:11:19 24 or process that is not covered by these patents, then
06:11:22 25 that's a relevant item to point out for apportionment that

06:11:26 1 should not be included. If it's -- if it's the part of a
06:11:32 2 cell phone that causes the image to slide sideways and that
06:11:39 3 has nothing to do with another component in the cell phone,
06:11:44 4 then it's proper to identify what's not to be included in
06:11:47 5 an award of damages to apportion out the actual accused
06:11:54 6 functionality.

06:11:55 7 But that doesn't give you the latitude to talk
06:12:00 8 about anything and everything else in the industry that may
06:12:03 9 have been known or unknown. If there's -- if there's a
06:12:06 10 portion of this remote capture and deposit process that are
06:12:11 11 not covered by these patents that should be properly
06:12:18 12 segregated out and apportioned for appointment -- for the
06:12:18 13 establishment of damages, that's fine. But that's not
06:12:21 14 nearly -- that's not nearly as broad a path as you simply
06:12:25 15 want to --

06:12:26 16 MR. HILL: Your Honor, that's -- that's
06:12:27 17 effectively forcing us into an entire market value
06:12:30 18 situation is what that does. These patents don't claim as
06:12:33 19 their invention duplicate detection. They claim the
06:12:37 20 implementation of a deposit process through the use of
06:12:41 21 general purpose computer and image capture devices. That's
06:12:44 22 what has to be valued.

06:12:46 23 And what we want to point out is what their damage
06:12:48 24 expert has done is he has taken the value of duplicate
06:12:51 25 detection and used it as a substitute for the actual

06:12:54 1 inventive step, which is the move to some more ubiquitous
06:13:00 2 device.

06:13:01 3 THE COURT: Is this some kind of a 101 argument --

06:13:03 4 MR. HILL: No, sir.

06:13:03 5 THE COURT: -- where there's no inventive concept
06:13:05 6 here?

06:13:05 7 MR. HILL: No, I'm not arguing there's an absence
06:13:07 8 of inventive concept. What I'm arguing is what -- they
06:13:12 9 have to value the inventive concept and not things other
06:13:13 10 than the inventive concept.

06:13:13 11 MR. SHEASBY: And, Your Honor, let me be very
06:13:15 12 clear. The Patent Office has given us a right to a set of
06:13:17 13 elements that are combined together. If he wants to do an
06:13:21 14 apportionment analysis, he can be asking about things that
06:13:24 15 are other than what those elements are that contribute to
06:13:29 16 remote deposit capture. That's fair game. For him to say
06:13:32 17 that individual elements in the claims are narrowing, that
06:13:32 18 is completely violative of -- of damages. That is our
06:13:35 19 invention. We own that altogether.

06:13:37 20 And so if there's something other than that,
06:13:39 21 that's valid from apportionment. But the -- the idea that
06:13:43 22 there's elements that are in the prior art, that is not
06:13:46 23 relevant to damages because the Patent Office gave us all
06:13:49 24 those elements in combination. This could only go to one
06:13:52 25 thing, which is derogating the value of this invention by

06:13:56 1 suggesting it's based on old subject matter, and that's
06:14:02 2 violative of the Federal Circuit precedent.

06:14:03 3 Old combinations together are -- can be novel.
06:14:05 4 And there's no case law that says you point out what
06:14:07 5 elements are in the prior art. That case law does not
06:14:09 6 exist.

06:14:10 7 MR. HILL: Your Honor, what he just argued to you
06:14:12 8 is that they have an entire mark value theory that they
06:14:17 9 don't have. Their experts apportioned. And the reason
06:14:19 10 their experts apportion and they apportion down to
06:14:22 11 duplicate detection value and fraud detection value, and
06:14:25 12 they say the entire market value rule is improper.

06:14:30 13 Now Mr. Sheasby tells you that if we want to show
06:14:32 14 that what their expert valued is the wrong thing because it
06:14:36 15 previously existed, that what -- we are cut off from that
06:14:40 16 because he had a system claim that covers the whole
06:14:42 17 machine, the whole process.

06:14:44 18 MR. SHEASBY: But we got that --

06:14:45 19 THE COURT: Tell me -- tell me why we are talking
06:14:47 20 about this with the Plaintiff's corporate representative
06:14:49 21 and not with the experts on damages.

06:14:50 22 MR. HILL: Because, Your Honor, their expert -- in
06:14:53 23 particular their damage expert, Mr. Weinstein -- answered
06:14:56 24 incorrectly, I believe, in his deposition that he believes
06:15:02 25 these patents create new methods of duplicate detection.

06:15:05 1 That's wrong. That's not the invention. Nobody else in
06:15:08 2 this case claimed that was the invention.

06:15:10 3 And I asked him: And that is what you valued?

06:15:13 4 And he says: Yes, that's what I valued.

06:15:15 5 So they've now dumped Mr. Calman because they know
06:15:19 6 Mr. Calman would conflict with that. He would say the
06:15:23 7 opposite because he has said differently about what the
06:15:26 8 invention is. And what they're doing now is trying to
06:15:29 9 prevent me from showing the exact same idea that duplicate
06:15:32 10 detection --

06:15:33 11 THE COURT: How is this witness supposed to have
06:15:35 12 any personal knowledge of that?

06:15:36 13 MR. HILL: Because this witness knows when
06:15:38 14 duplicate detection in electronic image clearing systems
06:15:44 15 came into existence and became a common practice, and it
06:15:48 16 was well before anything to do with these patents.

06:15:50 17 MR. SHEASBY: Your Honor, that is a prior art.
06:15:52 18 We've got a claim that says our system with duplicate
06:15:56 19 detection. If he wants to say there's other things that
06:15:58 20 are contributing to value separate from that, he's entitled
06:16:01 21 to do that. But he's not entitled to pick apart our claims
06:16:04 22 and say that this was known and this was known and this was
06:16:05 23 known.

06:16:05 24 THE COURT: All right, counsel, we've been up here
06:16:07 25 probably 10 or 12 minutes already. The jury is in the box.

06:16:10 1 I'm going to send the jury home for the end of the day.

06:16:13 2 We're going to get to the bottom of this, and we'll pick
06:16:15 3 back up with cross-examination tomorrow.

06:16:16 4 MR. SHEASBY: Thank you, Your Honor.

06:16:17 5 MR. HILL: Thank you, Your Honor.

06:16:18 6 (Bench conference concluded.)

06:16:22 7 THE COURT: Ladies and gentlemen, we're at a point
06:16:27 8 where I need to spend some time with the attorneys, and I'm
06:16:29 9 not going to continue to let you sit there and watch us
06:16:32 10 talk here at the bench, hopefully not hearing what we have
06:16:35 11 to say.

06:16:36 12 So I'm going to recess for the day at this point.
06:16:39 13 We'll continue with the Defendant's cross-examination of
06:16:41 14 Mr. Brady in the morning.

06:16:43 15 I'm going to ask you to take your juror notebooks
06:16:45 16 with you as you leave the courtroom and leave them closed
06:16:48 17 on the table in the jury room. I'm going to remind you of
06:16:51 18 all my instructions, including not to discuss the case with
06:16:54 19 anyone.

06:16:55 20 Again, remember, when you get home tonight,
06:16:57 21 whoever is there to meet you is going to ask about it.
06:17:00 22 Just don't go there. Also, let me remind you, you're
06:17:03 23 welcome to bring your cell phones and leave them in your
06:17:06 24 vehicles. I don't want cell phones brought back into the
06:17:09 25 courthouse tomorrow. There's no problem with you checking

06:17:11 1 an email or a text message or something related to your
06:17:14 2 family or your business from your vehicle during the lunch
06:17:17 3 break or otherwise in the day, but I don't want those
06:17:20 4 devices in the jury room, please.

06:17:23 5 Travel safely to your homes, follow all the other
06:17:27 6 instructions I've given you. Be prepared to start at 8:30
06:17:30 7 in the morning. And with that, you're excused for the
06:17:32 8 evening.

06:17:33 9 COURT SECURITY OFFICER: All rise.

06:17:34 10 (Jury out.)

06:17:35 11 THE COURT: All right. Be seated, please.

06:18:01 12 Counsel, let me remind you that before I bring the
06:18:11 13 jury in in the morning, I'm going to expect someone from
06:18:14 14 each side to go to the podium at the same time and jointly
06:18:19 15 present to the Court in the record the list of items from
06:18:23 16 the list of pre-admitted exhibits that have been used
06:18:25 17 during today's portion of the trial. We'll have that
06:18:27 18 complete and in the record before I bring the jury in at
06:18:30 19 8:30 in the morning.

06:18:31 20 Let me also remind you, as I did in chambers this
06:18:35 21 morning, that if you have disputes overnight that aren't
06:18:37 22 resolved through the meet-and-confer process, the Court
06:18:40 23 needs to be notified not later than 10:00 p.m., not
06:18:46 24 11:30 p.m. like last night.

06:18:48 25 And if those disputes can't be resolved through

06:18:50 1 your continuing meet-and-confer efforts, then I'll meet
06:18:54 2 with you by or around 7:30 in the morning, and we'll take
06:18:57 3 them up during that intervening hour before we start with
06:19:01 4 the jury at 8:30.

06:19:01 5 All right. Are there questions from either
06:19:03 6 Plaintiff or Defendant before we recess for the evening?

06:19:06 7 MR. SHEASBY: Nothing from Plaintiffs, Your Honor.

06:19:08 8 MS. GLASSER: Actually one very small procedural
06:19:10 9 issue. Tomorrow we'll be doing the reading of the
06:19:13 10 Lockwood-Stein testimony, subject to resolution of the
06:19:16 11 objections, and we were wanting to -- for planning
06:19:18 12 purposes, to understand the Court's preferences as to
06:19:22 13 whether we just had someone read that into the record or
06:19:25 14 whether we actually did it live with a person sitting in
06:19:27 15 the witness stand?

06:19:31 16 THE COURT: Actually, counsel, I don't think I
06:19:33 17 have a preference there. Do you have a preference as to
06:19:35 18 how to present it. Assuming we get there, because it's
06:19:38 19 your proposed evidence?

06:19:39 20 MS. GLASSER: It's relatively short. We can
06:19:41 21 probably just read it in. But if Your Honor has no
06:19:44 22 preference, we'll reconvene and let you know.

06:19:46 23 THE COURT: You let me know in the morning how you
06:19:49 24 want to do it.

06:19:50 25 MS. GLASSER: Thank you, Your Honor.

06:19:50 1 THE COURT: Mr. Melsheimer?

06:19:51 2 MR. MELSHEIMER: Thank you, Your Honor. May it
06:19:52 3 please the Court.

06:19:52 4 I just want to alert the Court that we're going to
06:19:55 5 be submitting a brief, a short trial brief on this written
06:19:59 6 description issue to clarify where I think we are and what
06:20:02 7 we believe the law is with respect to what we can and
06:20:05 8 cannot say, just so we don't have a continuing controversy
06:20:08 9 with the Court about it. I expect that will be filed in
06:20:10 10 the next hour or so.

06:20:12 11 THE COURT: Well, I don't expect you to have any
06:20:14 12 continuing controversy with the Court, but I'll be happy to
06:20:17 13 look at your brief.

06:20:19 14 MR. MELSHEIMER: Thank you, Your Honor.

06:20:20 15 THE COURT: All right. We stand in recess until
06:20:21 16 tomorrow morning.

06:20:22 17 I'd like to see Mr. Sheasby and Mr. Hill in
06:20:24 18 chambers.

06:20:25 19 COURT SECURITY OFFICER: All rise.

20 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/20

1/6/2020
Date